IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO. 5 OF 2005
IN
SESSIONS CASE NO. 112 OF 2004

The State of Maharashtra ..Appellants
(Ori.Complainants)

versus

1. Assis Domnic Warawale
2. Clint Ernish Fernandes ..Respondents
(Ori.Accused 1 & 2)

Mr. D. S. Mhaispurkar, APP for the Appellants - Original Complainants.

Mr. Majeed Memon, for the Respondents - Original Accused No. 1 and 2.

WITH

CRIMINAL APPEAL NO. 48 OF 2006
IN
SESSIONS CASE NO. 112 OF 2004

1. Assis Domnic Warawale
2. Clint Ernish Fernandes ..Appellants
(Ori.Accused 1 & 2)

versus

State of Maharashtra ..Respondents
(Ori. Complainants)

Mr. Majeed Memon for the Appellants -Original Accused Nos. 1 and 2.

Mr. D. S. Mhaispurkar, APP for the Respondents - Original Complainants.

AND

CRIMINAL APPEAL NO. 184 OF 2006

Wilfred Francis Dias ..Appellant
(Ori. Accused No.3)

versus

State of Maharashtra ..Respondents
(Ori. Complainants)

Mr. Naveen Chomal for the Appellant - Original Accused No. 3.

Mr. D. S. Mhaispurkar, APP for the State.

AND

CRIMINAL APPEAL NO. 355 OF 2006

AND

CRIMINAL APPEAL NO. OF 2006

State of Maharashtra ..Appellants
(Ori. Complainants)

versus

Wilfred Francis Dias ..Respondent
(Ori. Accused No. 3)

CORAM : D. G. DESHPANDE, &
S. A. BOBDE,JJ.

DATE : 9TH AUGUST, 2006

ORAL JUDGMENT (Per. D. G. Deshpande, J.) :

1. Heard learned counsels for the Accused and the learned APP for the State.

2. Five persons were involved in crime in this case. Out of them, three were major and therefore they were charge sheeted vide Sessions Case No. 112 of 2004. Trial of two accused, who were minors and were covered by The Juvenile Justice (Care and Protection of Children) Act, 2000, and were to be tried before the Court under the said Act. The names of Juvenile offenders are Clinton and Karan Khanna. The Confirmation Case is therefore arising out of the trial of three accused, i.e. Accused Nos. 1, 2 and 3. Accused No.1 and accused No.2 have been sentenced to death under section 302 read with 34,392 read with 34, 120 read with 34 of Indian Penal Code. Accused No.3 is convicted under Section 120B and 120B read with 392 of Indian Penal Code.

3. To be specific accused No.1 is convicted under section 302 read with 34 of IPC for committing murder of Mrs. Leticia Mendes and sentenced to death. Then accused No.1 is again convicted under Section 302 read with 34 of IPC for committing murder of infant of one and half years Master Dylon Sunil Lobo, and is sentenced to death. Accused No.1 is convicted under Section 307 read with 34 IPC for attempting to commit murder of Mrs. Glenda Sunil

Lobo and sentenced to 10 years and fine of Rupees Five Hundred, in default to undergo imprisonment for six months. Then accused No.1 is again convicted under Section 392 read with 34 of IPC and sentenced to R.I. for seven years and fine of Rupees Five Hundred, in default to suffer imprisonment for six months. Accused No.1 is also convicted under Section 120 B and Section 120B read with 392 of IPC and Section 449 read with 34 of IPC, but no separate sentences are awarded.

4. Accused No.2 is convicted under Section 302 read with 34 of IPC for committing murder of Mrs. Leticia Mendes and sentenced to death; he is also convicted under Section 302 read with 34 for committing murder of infant Master Dylon Sunil Lobo and sentenced to death. He is also convicted under Section 307 read with 34 of IPC for attempting to commit murder of Mrs. Glenda Sunil Lobo and sentenced to R.I. for 10 years; he is also convicted under Section 392 read with 34 of IPC and sentenced to R.I. for seven years and fine of Rupees Five hundred, in default, to undergo imprisonment for six months; he is also convicted under Section 394 of IPC and sentenced to R.I. for

seven years and fine of rupees Five Hundred, in default, to undergo imprisonment for six months; and also convicted under Section 120B and 120B read with 392 of IPC and 449 read with 34 of IPC, but no separate sentences are awarded.

5. Accused No.3 is convicted under Section 120B and 120B read with 392 of IPC and sentenced to undergo R.I. for five years each under the two sections and to pay a composite fine of rupees five thousand, in default, he shall suffer imprisonment for six months.

6. Since two out of the three accused were sentenced to death, the Additional Sessions Judge, Greater Bombay R. B. Malik has made this Reference for confirmation of the death sentence. Accused Nos. 1 and 2 have filed an appeal challenging their conviction. Similarly accused No.3 has filed his separate appeal. At the same time, the State has filed appeal against acquittal of accused No.3 Wilfred Dias from the offences under Section 302 etc. and have also filed another Appeal for enhancement of sentence of accused No.3 Wilfred Dias from 5 years under Section 120 read with 302 of IPC.

We heard all these matters together.

7. The facts giving rise to the Sessions Case are as under:

8. Deceased Leticia Mendes, an old women of 50 years of age, was staying at Borivli, Flat No.6, Lopes Manor, 2nd floor, I.C. Colony, Borivali (West), Mumbai 400 103. Her husband Peter Zavier Mendes was at the relevant time working at Abu Dhabi. Clifton the son of deceased Leticia (i.e. brother of Glenda Sunil Lobo - P.W. 18) was at the relevant time working at Dubai. P.W. 18 Glenda Lobo was her daughter, she was married and used to stay at Pune but had come to Bombay at or near the time when the incident occurred. Glenda Lobo had a child by name Dylon Lobo, he was one and half years of age, he was a sucking child.

9. According to the prosecution, the deceased Leticia Mendes was running coaching classes for teaching cookery and bakery. She used to give advertisements for that purpose and students or those interested in learning that skill, used to approach her. According to the prosecution all the

five persons i.e. three accused before this court and 2 juveniles (It is clarified here that the role of two juvenile boys has not to be discussed while appreciating the prosecution case. There is no discussion of any evidence against them nor any finding because juveniles are facing their trial independently before the juvenile court).

10. All these five persons entered into a conspiracy to rob the deceased Leticia Mendes and according to conspirators she had lot of money and valuables. Therefore, the conspiracy was hatched and it was witnessed by one Wayne Denzil Pereira (P.W 17) who was the cousin of accused No.2, but P.W. 17 did not participate in this conspiracy because of fear.

11. In pursuance of this conspiracy, according to the prosecution, these accused along with juvenile boys went to deceased Leticia Mendes on 17.11.2003, they decided to join her cooking classes. At that time Glenda Lobo (P.W. 18) was also present, she noted down necessary particulars in diary and the contact telephone numbers of these boys. Then, according to the prosecution on

19.11.2003 when deceased Leticia Mendes and her daughter Glenda Lobo (P.W. 18) were at their house, the accused went there in the afternoon i.e. after lunch. Some of the boys were sent by deceased Leticia Mendes to bring articles necessary for the classes and then when those articles were brought, all of them entered the kitchen. P.W. 18 Glenda Lobo went to bedroom to feed her child i.e. deceased Master Dylon Lobo. At about 3.30 p.m. Glenda Lobo heard the shrieks of her mother, she rushed to that spot and she found that her mother was lying in a pool of blood with several stab injuries in a passage near the kitchen. All the accused and the boys juvenile had weapons in their hand, when they saw Glenda Lobo, accused No.1 gagged her and dealt a blow on her head with the knife. She also saw her mother Leticia Mendes struggling but firmly held by juvenile boy Karan Khanna, therefore accused Nos. 1 and 2 dragged Glenda Lobo (P.W. 18) to the hall and accused No.2 inflicted blow of the knife on her throat, before felling down she saw that accused Nos. 1 and 2 and juvenile boy Karan Khanna rushed to the bedroom.

12. After sometime Glenda Lobo regained

consciousness and started yelling. Thereafter, accused No. 1 and juvenile boy Karan Khanna came out of the bedroom and Karan Khanna tried to suffocate her. Glenda Lobo pretended to be dead to avoid any further attack. She found afterwards that her mother was lying in a pool of blood and dead. She also saw her infant child Master Dylon Lobo hanging with the ceiling fan with a telephone cord. She also saw that cupboards etc. were opened and valuables from the house were missing.

13. According to the prosecution, Glenda Lobo rushed to the first floor, went to the flat of Adrin Gabrial Lopes (P.W.1). She narrated what had happened to her. At that time, sister of P.W. 1 Mrs. Pamera Jirar Lopes (P.W. 12) was present. She gave Glenda Lobo a piece of paper and then Glenda informed that four boys from Rizvi Caterers were responsible for this incident.

14. In the mean time Adrin Lopes (P.W. 1) had informed MHB Colony Police Station. By that time his sister Pamera Lopes (P.W. 12) had gone to the flat of deceased Leticia Mendes and found that Leticia Mendes was dead and the infant boy Master

Dylon Lobo was hanging to the ceiling fan.

15. Thereafter, P.W. 1 went to the police station, gave information, and in that background offences under Section 302 came to be registered.

16. Police immediately came to the spot, they found Leticia Mendes and infant child Master Dylon Lobo, dead. Glenda Lobo (P.W. 18) was removed to Bhagwati Hospital. Thereafter, investigation proceeded, spot panchnamas were made, dead bodies were sent for post mortem, photographs were taken and at about 8.30 in the night statement of Glenda Lobo came to be recorded after doctor found that she was fit to give a statement.

17. By that time accused Nos. 1, 3 and the juvenile boy Clinton Fernandes, were arrested. Thereafter, accused No.2 and juvenile boy Karan Khanna were arrested. Their clothes were seized under the panchnama. Finger print expert was called. Accused while in custody made statements from time to time under Section 27 of the Evidence Act and consequently incriminating articles were seized under Section 27 including weapons and

valuables. By that time, as per the prosecution case, the husband and only son of deceased Leticia Mendes had rushed to India. They identified the valuables. Glenda Lobo was discharged from the hospital on 27.11.2003. All those seized articles were sent for chemical analysis, and, in due course of time, charge sheet came to be filed.

18. Different charges against the accused Nos.1 to 3 were framed. They all pleaded not guilty. Thereafter, prosecution examined in all 25 witnesses to bring home the guilt of the accused.

19. Statements of the accused under Section 313 of Criminal Procedure Code, were recorded. Accused did not led any evidence in defence, arguments were heard, and, the trial court came to the conclusion about the guilt of these accused and sentenced them accordingly, as stated above. Therefore this reference for Confirmation of death sentence, Appeal filed by the accused Nos. 1 and 2, Appeal filed by the accused No. 3 for acquittal and Appeals filed by the State for enhancement of sentence of accused No.3 and acquittal of accused No.3 under Sections 120B read with 302 of IPC.

20. Evidence, that is, tendered by the prosecution to bring home the guilt of the accused, and, which is accepted and relied upon by the trial court in convicting the accused, is of the following type and nature.

21. P.W. 1 Adrin Lopes - occupant of the first floor of the same building, to whom Glenda Lobo in her injured condition approached and narrated the incident and who lodged FIR - Exhibit 12. P.W. 12 Pamera Lopes who took down the information given by Glenda Lobo in injured condition is at Exhibit 54. Then different witnesses on panchnama, enquest, recovery and discovery under Section 27 of the Indian Evidence Act, then P.W. 18 Glenda Lobo - daughter of deceased Leticia Mendes and mother of deceased infant boy Master Dylon Lobo, husband of Leticia to identify the jewellery and articles, doctors who conducted post mortem on both the bodies, Finger Print Expert to prove the finger prints of accused No. 1 and investigating officers, coupled with the report of Chemical Analyser regarding different articles, referred to in and the recovery of weapons and the jewellery at the

instance of the accused.

22. We heard Mr. Majeed Memon for the accused Nos. 1 and 2, Mr. Naveen Chomal for accused No. 3, so also Mr. D. S. Mhaispurkar, learned A.P.P. for the State, at length. We were taken through the entire evidence and the proved documents and circumstances.

23. The main contention of Mr. Memon was that when these accused are convicted by the trial court, the trial of juvenile accused is not yet commenced. It was not certain what type of evidence will appear before that court, whether the witnesses who had deposed here against the accused would support the prosecution in that case and in such a situation, his first contention was that this Reference as well as Appeal were required to be stayed. When this submission was made on the first day of hearing, we rejected the same and thereafter the matters on merits were heard. However, Mr. Memon again contended that looking to the fact that two out of the five persons have been sentenced to death and the trial of two juvenile boys yet to start, confirmation of death sentence would be too risky

without waiting for the trial of juvenile offenders. He also contended, though alternatively, that if the role of each accused is seen, then from the evidence of Glenda, it would appear that both the juvenile offenders were responsible for the murder of Leticia Mendes and Master Dylon Lobo, and these three accused had no role to play in both the murders, and, therefore, sentencing accused Nos. 1 and 2 to death for all the offences when two major offenders i.e. juvenile boys would not get any sentence for their acts or commission, was something that require this Court to stay the Reference and hearing of the Appeal.

24. As against this, learned APP pointed out that there was no provision either in Criminal Procedure Code or in The Juvenile Justice (Care and Protection of Children) Act, 2000, that if two trials are simultaneously going on against the present accused and the juvenile offenders in two different courts, then one should be stayed till the disposal of the other. The learned APP also pointed out that the trial court has restricted its finding to the role played by these three accused and has not touched at all the case against the two juvenile

offenders, and, the same can be done by this court irrespective of the fact that the trial of two juvenile offenders is yet to begin. He, therefore, contended that there was no proprietary nor legal requirement in postponing the hearing of the Reference and the Appeal or staying the proceedings before this Court.

25. So far merits of the matters are concerned, Mr. Memon firstly urged that the only eye witness in this case is P.W. 18 Glenda Lobo. According to him she has made an innumerable omissions and contradictions in the deposition and her testimony was liable to be rejected on account of the grave suspicion that arises about her truthfulness because of those omissions and contradictions. He also stated that conduct of Glenda Lobo in noting down the names and telephone numbers of five boys on 17.11.2003 in a notebook and its seizure were all doubtful and were all suspicious. He contended that this notebook was prepared subsequent to the release of Glenda Lobo from the hospital on 27.11.2003 to strengthen the prosecution case.

26. He also contended that when Glenda’s

statement was recorded on 19.11.2003 by Investigating Officers at 8.30 p.m. she was not at all fit to give any such statement and there is no evidence in that regard. Therefore, according to him, Glenda's statement which was recorded as a dying declaration could not be used by the prosecution for corroboration. He also challenged the Glenda's evidence on number of other aspects, with which, we will deal in detail, later on.

27. So far as evidence of P.W. 1 Adrin Lopes and her sister P.W. 12 Pamera Lopes, are concerned, he contended that the vital document i.e. note prepared by P.W. 12 can also be stated to be an after thought and creation of a forged document because if this document was with P.W. 12 Pamera Lopes on 19.11.2003 itself, there was no reason for her to keep it with her till the next day. He also pointed out that the evidence of Investigating Officer and P.W. 12 Pamera Lopes, in this regard regarding Exhibit 54, was highly suspicious and doubtful.

28. So far as evidence of conspiracy given by P.W. 17 Wayne Denzil Pereira is concerned, Mr.

Memon contended that he is also a got up witness and his conduct is highly suspicious. According to Mr. Memon, if P.W. 17 Wayne Pereira was a witness to the talk of conspiracy amongst other accused, there was no reason for him to remain silent till the conspiracy was materialised by the other accused. He also said that there were serious discrepancies regarding the time of the conspiracy and the presence of the accused at the house of Leticia Menedes on 17.11.2003. Therefore, according to him, his evidence was also liable to be doubted and rejected.

29. So far as recovery of three weapons are concerned, Mr. Memon contended that all the three weapons were knives, and they were easily available at the house of deceased Leticia looking to the fact that she was conducting cooking classes, and, that there was no evidence on record to show that when the accused entered the house of deceased Leticia Mendes on 19.11.2003 in the afternoon they were not carrying any weapons. Therefore, according to him, there is a doubt as to whether the weapons recovered were the weapons used in the offence. Secondly there was no evidence that accused had carried the

weapons with them, and, thirdly, the recovery of the weapons was also doubtful.

30. So far as recovery of jewellery from the different accused is concerned, Mr. Memon contended that the evidence in that regard was not at all satisfactory and convincing and did not satisfy the requirements of the Evidence Act. Some of those recoveries were from open place and therefore all evidence of recovery, was liable to be rejected.

31. Mr. Memon also seriously criticised the role of different police officers examined in this case. He contended that FIR which is allegedly lodged by P.W. 1 Adrin Lopes was not at all FIR and should not have been taken into consideration because information about commission of murders was admittedly given to the police on telephone. He also criticised the manner in which Glenda's statement came to be recorded on 19.11.2003. According to him, it was unheard of that one police officer was to put questions to Glenda and the other officers of the equal rank of Sub Inspector was recording the statement.

32. So far as dying declaration (which is not now the dying declaration because Glenda Lobo survived the attack). Mr. Memon contended that looking to the injury suffered by Glenda it was impossible that she was in a condition to give such a statement to the police at 8 p.m. on 19.11.2003. He contended that certificate of doctor produced by the prosecution and proved at Exhibit 105 was introduced at the stage of trial and it was a got up document because it was not filed with the charge sheet. He also contended that on dying declaration of Glenda, there is no certificate of doctor and there was no explanation why the so-called certificate of fitness was obtained on a separate piece of paper.

33. Mr. Memon also contended that it was surprising to note that even though names of none of the accused became known to the police till the recording of statement of Glenda at 8.30 p.m. on 19.11.2003, Accused were arrested. According to him, this was therefore a case where police had arrested the accused before getting information from a person who was a witness in the incident or to the incident and, it is therefore a case where accused

could be said to have been falsely implicated because of the hue and cry that was raised in media with reference to brutality of double murders.

34. Alternatively, Mr. Memon submitted that even if the prosecution case is accepted as it is, at the most it can be said to be a case of conspiracy for robbery and no conspiracy for murder and it might be according to him that because of resistance the accused inflicted blows upon Leticia Mendes and in the said heat of passion hanged the child to the ceiling fan with telephone cord.

35. Mr. Chomal while arguing Appeal for accused No.3 contended that accused No.3 has been falsely implicated. According to him, the murder of Leticia and the child Master Dylon Lobo, had invited wide publicity in media and newspapers, there was pressure upon the police officers to trace culprits and under that pressure the police with the help of P. W. 17 Wayne Denzil Pereira implicated the accused No.3. According to him, the entire theory of conspiracy is bogus. Firstly, as argued by Mr. Memon the difference of time coming in the evidence of P. W. 18 Glenda and P.W. 17 Wayne Pereira is

not at all explained by the prosecution. If version is true that these boys came to her house on 17.11.2003 at 8.30 a.m. then version of P.W. 17 Wayne Pereira that they met for the purpose of conspiracy at 9.30 a.m. and then they went to the house of Glenda, gets falsified. He stated that P. W. 17 was educated boy and therefore he could not have committed mistake of two hours in mentioning the time of his meeting and going to the house of Leticia. He, therefore, urged that if P. W. 18 Glenda is to be believed, then evidence of P.W. 17 Wayne Pereira becomes suspicious and if P. W. 17 is believed then Glenda's evidence, becomes suspicious. Further, according to him, there are number of contradictions and omissions and vital missing links in the evidence of P. W. 17 regarding the talk Wilfred and other accused had on that day at Mitchowki at Malad. He, further contended that P. W. 17 was coming from a respectable family. He had no business to enter into such conspiracy and there was no explanation why this young boy kept silent after coming to know of the conspiracy. Mr. Chomal argued that P. W. 17 Wayne Pereira has admitted in his cross examination that his statement was read over to him

twice by the police before giving evidence and he was asked to depose according to the statement. This was sufficient to discard the testimony of P.W. 17 Wayne Pereira Mr. Chomal also argued that the evidence of recovery of knife at the instance of accused No.3 Wilfred was disbelieved by the court and recovery of jewellery from accused No.3 was also a part of the game of the police to implicate Accused No.3 Wilfred Dias.

36. Mr. Memon also raised other points regarding the prosecution, which, we will deal with in due course.

37. As against this, learned APP contended that the evidence of P.W. 1 Adrin Lopes, P.W. 12 Pamera Lopes and P.W. 18 Glenda Lobo, was itself sufficient to convict the accused. He stated that inspite of omissions and contradictions in the evidence of Glenda Lobo, there were no reasons to disbelieve her evidence because she herself was a victim having suffered injuries on her neck. According to learned APP, injuries on the person of Glenda Lobo proved her presence beyond reasonable doubt at the time of the incident. There were no

reasons for her to falsely implicate any of the accused. He also contended that from the evidence of Glenda Lobo, it appeared that she was a very brave woman who inspite of serious injuries upon her neck and throat had shown courage to contact P.W. 1 Adrin Lopes on the first floor and give particulars of culprits to P.W. No. 12 Pamera Lopes, which document played vital role in unfolding the case against the accused. So far as physical fitness of Glenda Lobo while giving her statement to the police i.e. dying declaration is concerned, learned APP contended that the medical papers proved and brought on record, clearly showed that she was conscious, and well oriented before and at the time of recording of the dying declaration. So far as the certificate of fitness given by the doctor on a separate piece of paper is concerned, learned APP contended that if the medical papers i.e. case papers of Glenda Lobo do show that she was well oriented and conscious and when there was positive evidence of the doctors in that regard then obtaining of fitness certificate on a separate piece of paper, cannot be doubted at all.

38. Learned APP also relied upon the evidence of

P.W. 1 Adrin Lopes and P.W. 13 Yuvraj Patil regarding the disclosures made by Glenda Lobo after she was assaulted and when she came down on the first floor. He also relied upon the evidence of P.W. 17 Wayne Denzil Pereira, who has unfolded the conspiracy.

39. Regarding cause of death of Leticia Mendes and infant child Master Dylon Lobo, the learned APP stated that there was no challenge at all to the fact that Leticia Mendes and infant child master Dylon Lobo died homicidal death.

40. Learned APP also pointed out that noting down the names of the accused, who wanted to join Leticia's cooking classes by P. W. 18 Glenda Lobo on 17.11.2003 was most natural and in course of business because the notebook that was proved, tendered on record, showed similar such entries either made by Leticia Mendes or some one else or by Glenda Lobo whenever she was present at the house of her mother.

41. Regarding recovery of seizure of notebook, the learned APP contended that if the fact that

notebook was there and entries were there, has been satisfactorily proved by the prosecution, then delayed seizure, could not create any doubt about the genuineness of the document.

42. Regarding the attack of Mr. Memon on identification parade and the so-called lapses in holding the parade, the learned APP contended that when from the evidence of P.W. 18 Glenda Lobo it has been proved that she had sufficient and ample opportunity to see and know all the accused on 17.11.2003 and 19.11.2003 and when one of them was known to her very thickly, then this was a case where identification parade was not at all necessary, and, therefore according to him even if the evidence of identification parade is rejected as being doubtful, it did not affect the case of the prosecution at all.

43. Regarding admissibility of the FIR as tendered and proved by P.W. 1 Adrin Lopes vide Exhibit 12, learned APP contended that it may be that police had received information on telephone that the double murder was committed in a particular building, but that was a cryptic information not

sufficient to set the police machinery in motion and, therefore, there was nothing wrong if the police officer went to the spot to ascertain the facts or contacting P.W. 1 Adrin Lopes and then recorded his statement, which came to be treated as FIR.

44. So far as the evidence of recovery of weapons and recovery of jewellery is concerned, learned APP contended that the panchas examined by the prosecution were respectable persons, they had supported the prosecution fully, which rarely happens now a days in a criminal case. Nothing is brought on record in the cross-examination of these witnesses as to why they should give false evidence against the accused and favour the police, and therefore, this recovery which stood proved, create strong evidence about the guilt of the accused.

45. So far as three weapons are concerned, the learned APP contended that it may be that the weapons were kitchen knives but that did not affect the prosecution case at all. Learned APP conceded that there was no evidence to show that the accused had brought weapons with them. But he further

contended that if the accused had entered into a conspiracy to rob the old woman of her valuables and when they were knowing that Glenda was also staying there, then they knew that there would be resistance to their attempt of robbery and brining of weapons with them secretly, hidden in the situation and circumstances and the conspiracy.

46. Further, learned APP contended that there was nothing on record to show that any of the weapons were recovered from open space nor any evidence that jewellery was planted by the police to foist the responsibility upon the accused. He stated that the jewellery was identified by the husband of deceased Leticia (P. W. 21), son of deceased Leticia (P. W. 3 Gliffton Peter Zavier Mendes, and daughter Glenda Lobo (P.W. 18) as belonging to deceased Leticia and Glenda Lobo, that none of the accused had claimed that jewellery and therefore, recovery of jewellery belonging to the deceased Leticia and/or Glenda Lobo (P.W. 18), was a strong piece of evidence connecting the accused with the offence of murder because recovery was soon after the commission of the murder.

47. About arrest of the accused before recording dying declaration of Glenda Lobo, the learned APP contended that there was nothing unnatural if from the disclosures made by P.W. 1 Adrin Lopes and P.W. 13 Yuvraj Patil to the police, the police could trace the accused and arrest them even before the statement of Glenda Lobo was recorded.

48. Learned APP further contended that the evidence of the P.W. 19 Hemchandra Ganpatrao Bane - Finger Print Expert, the evidence of the Investigating Officer, was all properly and rightly appreciated by the trial court, and, all this evidence was so clinching that there was no reason for the trial court to come to any different conclusion than the one about the guilt of the accused. He, therefore, fully supported the judgment of the trial court.

49. The learned Counsel Mr. Memon, Mr. Chomal and the learned APP Mr. Mhaispurkar, thereafter, or in course of their arguments also made submissions regarding the sentence, but, we will deal with that aspect of the matter after considering respective arguments, as noted above.

50. Having noted down the arguments of Mr. Memon about challenge of judgment of conviction and death sentence, and arguments of Mr. Mhaispurkar, supporting the trial court's judgment, we, now propose to deal with the evidence on record and respective submissions. We propose to deal with the aspects in the sequences, in which the incident occurred. Generally, the sequence will be tried to be maintained.

51. The first evidence in this regard is of P.W. 17 Wayne Denzil Pereira, who has given evidence of conspiracy. His age is 18 years at the time of giving evidence. He therefore falls in the same age group of the accused. He has stated that in 2003 he was a student of National College at Linking Road, Bandra in XIIth Standard. Accused No.2 and, juvenile boy Karan Khanna are his cousins. Accused No. 2 is his mother's brother son, and, Karan Khanna is his mother's sister's son.

52. Further, according to P.W. 17 Wayne Pereira he and Karan Khanna stayed with his grand mother or they met there. On 17.11.2003 in the morning Karan

Khanna juvenile accused told that he was joining cooking classes in Borivli. Witness P.W. No. 17 says that he and accused No.2 were not interested in that class but Karan Khanna insisted that they should come and have a look at the class. Thereafter, Karan Khanna took P.W. 17 Wayne Pereira and accused No. 2 at the place in Mitchowki at Malad. Karan Khanna introduced the three remaining accused as his friends, they were already waiting there. Accused No. 3 was there so also accused No.1. Then witness P.W. 17 says that accused No. 3 told that the lady who was taking coaching classes probably had lot of money and he told that they should make a plan to rob her house. P.W. 17 got frightened and he told accused No.2 that it was not proper. Then according to him on 20.11.2003 he read in the newspaper that accused had committed double murders, and, he was shocked, then his statement was recorded by the police.

53. This is all evidence of P.W. 17 Wayne Pereira about conspiracy. According to him, therefore conspiracy to rob deceased Leticia Mendes was hatched by the accused on 17.11.2003 itself. This witness was subjected to lengthy cross

examination on behalf of accused Nos. 1 and 2 and separately by accused No.3. All the attempts in the cross examination were to show that the evidence is false because the witness even after coming to know of the conspiracy did not tell about it to anybody i.e. neither his relatives or other friends or to the police. Another attempt was also made if the conspiracy took place at 9 O'clock, then it falsifies the evidence of Glenda where she says that on 17.11.2003 at about 8.30 a.m. in the morning Accused No.3 Wilfred Dias came with four boys.

54. Mr. Memon and Mr. Chomal vehemently urged that if according to P.W. 17 Wayne Pereira he met other accused at 9.00 a.m., then some time must have been taken place for conspiracy and it was physically impossible for them to reach the house of deceased Leticia Mendes at 8.30 a.m. Mr. Memon tried to contend that distance at Mitchowki at Malad and Borivli is not less than 20 minutes by any means of transport and it falsifies story of P.W. 17. We are not at all convinced with the submissions made by Mr. Memon and Mr. Chomal. Firstly, because P.W. 17 is a young boy of 18 years. The meeting has taken place on 17.11.2003, secondly, his

evidence was recorded in May 2005 i.e. after a gap of about more than two years, and, thirdly witnesses in India are always lax about time factor. Fourthly, this witness with whom two of the accused are related have obviously no reason to give testimony against them about conspiracy, if it had not taken place in his presence or before him.

55. Second ground of attack of Mr. Memon and Mr. Chomal was that if the witnesses had come to know about the conspiracy why he did not narrate these facts to any of his elderly members of family or to others including police or to his grand mother. The witness P.W. 17 has given a satisfactory explanation in that regard because according to him, firstly, he did not believe the plan that it would be carried out and executed and secondly when on 20.11.2003 he read the news in the paper about the double murder, then only he realised that the plan has been executed and thereafter he became frightened. Nothing is unnatural if a boy of 18 years of age gets frightened, firstly, about the conspiracy, and, secondly, after reading the news of double murder. Repeatedly, the witness has stated that he was too scared to disclose the plan to

anybody else. We, do not find that explanation is in any way unnatural considering his tender age. No motives had been attributed to the witnesses in this cross examination nor suggested as to why he should give false evidence against these accused because there is no enmity between him and the accused nor there is anything to show that the witness had gained any peculiar advantage by deposing against the accused.

56. Therefore, this witness has to be believed and was rightly believed by the court that the accused prepared a plan to rob deceased Leticia and they wanted to join classes only for that purpose and the pretext was chosen by them to join the class to learning art of cooking or bakery.

57. Second thing in sequence is evidence of Glenda Lobo - P.W. 18 about what happened on 17.11.2003. She has stated that on 17.11.2003 at about 8.30 in the morning Accused No. 3 - Wilfred Dias son of Clera Dias came to her house with four boys, Wilfred Dias introduced all of them and told that four boys were interested in cookery classes, which deceased Leticia Menedes was conducting.

Letecia explained the details of the course and details of the fees. Leticia told them that the course would begin from 19.11.2003. Then Leticia Menedes asked Glenda Lobo to note down the names of boys in a rough notebook. Glenda Lobo enquired from these four boys their names and contact numbers and noted them. She also wrote that the boys were referred by Wilfred Dias - accused No.3. She also wrote down the date on which the class would commence and name of the course i.e. chocolate making. She has stated that on that day Clinton Fernandes - juvenile boy paid Rs.600/- to Leticia Menedes.

58. Glenda Lobo has stated that accused No.3 Wilfried was the son of Clera Dias and she has stated that Leticia was the teacher of Clera Dias- the mother of Wilfred Dias. Therefore, Wilfried was known to her. She also stated that Wilfried told her that four boys were from Rizvi Catering College. She then proved the notebook at Exhibit 73 and the notings done by her. So far as this aspect of the matter is concerned, main attack of Mr. Memon was about notebook Exhibit 73. She was confronted with Exhibit 73. She stated that apart from Exhibit 73

there were other pages in the notebook where she had written some particulars. These pages pointed out to her marked as Exhibits 76, 77, 78, all were from one notebook. Rest of the handwriting in the notebook was of her mother Leticia Menedes. She admitted that she did not know if there was a practice of mention of the names of the persons who introduced the prospective candidates for her mother's classes. Then, she admitted that there was nothing in Exhibit 73 to show that it was written on 17.11.2003 but her explanation was that it was a rough notebook and the date of commencement of classes, was written.

59. About seizure of this notebook the case of the prosecution was severally criticised by Mr. Memon, the witness P.W. 18 Glenda Lobo has stated that she produced the notebook before the police on 27.11.2003 i.e. the day on which she was discharged from hospital. She also stated that notebook was kept in the drawer of the cupboard of the bedroom. In this context, Mr. Memon vehemently urged that if Glenda suffered injury and was admitted to the hospital on 19.11.2003 then this notebook was lying in the house. Admittedly police had carried out

search of the house again and again, the house was under their control and command and there is no explanation from the prosecution why this notebook was not seized on 19.11.2003 itself. Mr. Memon drew our attention to the fact that while in hospital Glenda was allowed to go from hospital for 2 hours on 25.11.2003 . According to him, it must be within these two hours that she went to house, prepared Exhibit 73 and then after the discharge from the hospital handed over to the police, as a piece of evidence. Mr. Memon therefore contended that non seizure of this vital and important document by the police till 27.11.2003, inspite of intensive search of the house is strong enough to create suspicion about the authenticity or genuineness of this document. According to him, Exhibit 73 is a concocted and fabricated document (it has to be noted that Exhibit 73 is a portion of the notebook where the names of the accused and other particulars are written).

60. Learned APP agreed that after Glenda Lobo was removed to the hospital on 19.11.2003, the house was searched, spot panchnama was made before the panchas, incriminating articles were seized and

Glenda's statement was also recorded on 19.11.2003 at 8.00 p.m. Her statement which was recorded as a dying declaration was exhibited as Exhibit 108. It is recorded on 19.11.2003 at or near about 8.30 p.m. She has stated in the statement that when Wilfried brought four boys and gave the particulars, she noted down in a notebook.

61. For proving this panchnama of scene of offence, prosecution has examined, P.W. 6 Mathews Varghese. He has stated that on 19.11.2003 he was requested at about 5 to 5.30 p.m. by the police to act as panch. Then he was taken to building Lopes Manor on the second floor. He met P. I. Mane. Then he entered the flat and whatever he noted has been stated by him. No question is put to this witness that during panchnama or while conducting panchnama and seeing the house of the deceased each and every nook and corner, each and every almirah, cupboards, trunks, boxes, or all storing place were seen to find out the incriminating articles. Not a single question in the cross examination has been put to this witness. Panchnama is about whatever appeared to be connected to the crime. If the panchnama had mentioned the almirah or cupboard was

searched and nothing incriminating was found, then finding of notebook on 27.11.2003 or not recovery of the notebook from 19.11.2003 to 27.11.2003 would have been of some serious consequence to the prosecution. But, when, panchnama nor the evidence of panch witness P.W. 6 shows that the entire house was searched from top to bottom, from east to west, north to south and nothing was left unturned, then non seizure of the notebook on 19.11.2003, does not give any benefit to the accused.

62. It may be that in her statement Exhibit 108 Glenda Lobo had stated that she had noted the particulars but either the police, looking to the other important aspects of the investigation did not consider it important at that time or they decided to wait till Glenda comes back home from hospital and hands over the notebook to them. Non recovery of therefore this Exhibit 73 i.e. entire notebook (though entire notebook is not exhibited on 19.11.2003 upto 27.11.2003) does not therefore create any doubt nor it casts any suspicion about its genuineness.

63. There is one more reason to reject the

argument of Mr. Memon. Admittedly deceased Leticia was conducting cooking classes, she used to issue advertisement in that regard, people used to approach her for joining the classes and therefore the notebook shows that she had made different notings in that regard at different times. Glenda Lobo has admitted that apart from Exhibit 73 there are certain entries in her hand in that notebook which are similar in nature i.e. that they are about the persons joining the classes, their names etc. They are marked Exhibits 76, 77 and 78. Therefore it was a practice of Leticia Mendes and also of Glenda Lobo to take notings of the names and the persons interested in joining classes, then it has to be said that the entry of 17.11.2003 was made in usual course of business or in a course of transaction. It is not that a notebook was opened for the first time on 17.11.2003 and the names of these accused were entered. If that had been done there would have been some reasons to suspect the authenticity of the notebook but when Exhibit 73 is an entry made in course of time as per the usual business practice of deceased Leticia Mendes or Glenda Lobo, then it cannot be said that this entry Exhibit 73 is an after thought. Its non seizure on

19.11.2003 itself does not create any doubt about the document. It cannot be said that after discharge from the hospital, Glenda Lobo with the connivance of police manipulated this document.

64. This notebook contains about 188 pages as per printed information on the cover of the notebook. All entries right from page 1 to Exhibit 73 are about names of students, male or female, their phone numbers and what whey want to learn. So therefore writing of names of the students, the class, nature of the training they want to take and their phone numbers, is, as per the practice of Leticia Mendes and Glenda Lobo.

65. In this notebook Exhibit 73 is an entry dated 19.11.2003. Following things are written there:

"**19/11 Chocolates (Ref. by Wilfred Dias)**

1) Ashish Baravale - 28886671
2) Clinton Fernandes - 28897604
3) Karan Khanna - 28882229
4) Clint Fernandes - 28897604"

Apart from this, entries at Exhibits 76, 77, and 78 are in the hand writing of Glenda Lobo.

66. Therefore, writing the names of the boys or prospective candidates, their phone numbers, is a practice which was being followed by Leticia Menedes and Glenda Lobo and as such writing of names of these four boys brought by Wilfried Dias - Accused No.3, vide Exhibit 73 is, totally and completely, in nature and in the course of business. Therefore, if the entries i.e. Exhibit 73 is natural in the course of business then this so-called delayed seizure by the police or particulars given by Glenda to police on 27.11.2003 after her discharge cannot at all be said to be the circumstance creating doubt or suspicion about Exhibit 73.

67. We, have already pointed out that panchnama does not show that each nook and corner of the house, each and every almirah, cupboard, storing place was searched during panchnama. That has not been done, and, neither the police officers nor the panch states so and if this notebook was kept in

cupboard or drawer either the police did not see that particular cupboard or drawer or did not realise the importance of the notebook on 19.11.2003 itself. It may be that they came to know about this notebook when Glenda's statement was recorded at night. But delay in getting this notebook in hand on 27.11.2003 after Glenda was discharged from the hospital, cannot create any doubt about the entries made vide Exhibit 73 and about genuineness of this document including the notebook. (though the notebook in its entirely has not been exhibited).

68. Now, as per the sequence of events, the incident of murder occurred first wherein Leticia Menedes was murdered, her grand son i.e. Glenda's son Master Dylon Lobo was killed. That evidence about the actual incident will be considered by us, later on.

69. Let us, now, consider the evidence of P.W. 1 Adrin Lopes and P.W. 12 Pamera Lopes - sister of P.W. 1.

70. P.W. 1 is about 51 years of age when his evidence was recorded. He appears to be a priest

because he has given his occupation as Minister of Gospel of peace. He is staying in the same building on the first floor, whereas Leticia Menedes was on the second floor. At the relevant time her daughter and daughter's son were also staying in the house of Leticia. He stated that the Leticia was conducting catering classes at her residence and on 19.11.2003 at about 4.00 p.m. he was at his house. He had kept his door open. At that time Glenda came down almost drenched in blood. His wife could not even recognize Glenda. She enquired from Glenda as to who she was. Glenda uttered few words. At that time P.W. 12 Pamera Lopes was also present because P.W. 12 resides in the adjoining flat. Then Glenda told them "that four boys from Rizvi caterers attacked her. She gave out a phone number and said that her gold ring and chain had been removed". She said in effect that care should be taken of her child and she collapsed.

71. P.W. 1 Adrin Lopes further stated that Glenda had a cut on her neck which was deep and a gash on her forehead. Then he immediately called the police station and called for ambulance. When Glenda collapsed he sent his sister P.W. 12 Pamera

Lopes upstairs to call Leticia, sister came back and told that Leticia was lying in a pool of blood near the kitchen door of her flat and the little boy was hanging to the ceiling fan with the telephone cord. Then he went to the police station along with his son on motor bike, informed them. His statement was recorded at Exhibit 12. He admitted his signature thereupon.

72. This witness P.W. 1 Adrin Lopes is therefore the witness to whom Glenda had made immediate narration of the type reproduced above. He was subjected to cross examination and certain minor omissions are brought on record, e.g. he could assign any reason why it is not mentioned in FIR Exhibit 12 that his wife could not recognise Glenda, he could not assign any reason why the fact that Glenda gave telephone number is not mentioned in Exhibit 12. He has stated in the cross examination that he accompanied Glenda to the hospital. He was there for about 30 minutes and Exhibit 12 was written after he returned back from the hospital. His cross examination has not at all resulted in shaking his credit or creating doubt about his testimony. Admittedly, he is not an eye

witness but he has stated about the narration made by Glenda to him and her removal from his premises to the hospital.

73. Prosecution examined P.W. 12 - Pamera Lopes to corroborate P.W. 1 and also to give corroboration to the evidence of Glenda. P.W. 12 Pamera Lopes is about 44 years of age at the time of evidence and a teacher by profession. She has stated that deceased Leticia Mendes was staying in flat no. 6 on the 2nd floor. At that time her married daughter Glenda Lobo and minor infant child of Glenda was also staying there. The child was about 18 months of age. Then this witness P.W. 12 has stated that on 19.11.2003 she returned from house from 3.30 to 4 p.m. She was just relaxing before her tuition classes to commence. She heard some shouts, she went out and saw that Glenda Lobo was totally drenched in blood. She was to say something but she fell down. Door of flat of P.W. 1 was open. There were some people in the house. She asked Glenda Lobo what happened and tore a page from her notebook and noted down what Glenda Lobo was telling. Glenda told her that four boys from Rizvi Catering Classes had come to learn making

chocolates. She also told that Wilfred Dias - accused No.3 - the son of Clera had sent them and she said "My baby My baby" by pointing her finger up.

74. According to P.W. 12 she therefore ran up to the second floor. She found that floor was covered with blood. The door was wide open. Leticia was lying in a pool of blood. She was scared to touch her as she was motion less. Then she went to other room and saw that the child was hanging to the ceiling fan by telephone wire. She has stated that whatever was narrated by Glenda was written down by her in the page which she tore from the notebook, which is marked Exhibit 54, to them, and, then her statement was recorded. Exhibit 54 is an important document of the prosecution and it is reproduced as it is :

"WILFRED
CLARES DIAS
TEACHING IN REMEDU SCHOOL
4 BOYS
TO LEARN
CHOCHLATES

RIZVI CATERING

95206137980

SUNIL

POONA

Injured Lady :- Glenda Lobo (24 Years)

(Cooking Classes)"

This witness P.W. 12 was also subjected to lengthy cross examination. Admittedly, this witness has not seen anything about the attack by the accused. All the culprits were in the Leticia's house. She is witness to what she saw when actually Glenda came down and what Glenda told and took down on a piece of paper. She has obviously no motives to give false evidence. She has no prejudice nor enmity with any of the accused. She has stated that her statement was recorded on the next day i.e. 20.11.2003. Certain omissions which are absolutely minor and insignificant were brought on record in the cross examination e.g. she has stated that she was working as teacher, that portion is not stated in her statement to the police. She stated that when she saw Glenda outside for the first time Glenda was in a serious injured condition and she was injured on the neck and forehead. Both these

injuries were bleeding. She has stated in the cross examination that she recorded entirely whatever Glenda told her, that Wilfred was not known to her whose name appear on Exhibit 54. But she was knowing Clera Dias - mother of Wilfred. It was tried to be suggested that some of the wordings in Exhibits 54 were interpolated and written subsequent but she explained that the difference depends upon the force applied in writing. She stated that the fact that Wilfred had sent four boys is not mentioned in her statement before the police. There is no mention that Glenda was raising her hand "My baby My baby", this is an omission. She has stated that she handed over Exhibit 54 to the police on 19.11.2003 itself and denied the suggestion that it was handed over to them on 20.11.2003. She had admitted that no panchnama was drawn while taking Exhibit 54 from her. She admitted in the cross examination on behalf of accused Nos. 1 and 2 that she had seen the accused prior to the incident and after the incident but she did not see them on the day of the incident. She also admitted that she did not know the accused by their names and also admitted that her knowledge about the incident was based on the narration made by Glenda.

75. The evidence of this witness and the writing of Exhibit 54 by her, was also criticised by Mr. Chomal on the same grounds. According to him this document is also creation by the police to rope in accused No.3 Wilfred because it is he whose name appears in Exhibit 54. We have to reject this argument in its totality. If at all right from the moment the police had decided to implicate all the accused falsely, firstly, there has to be motive in doing so. Secondly, why the police should implicate all boys near about the age of 20 or so, is nowhere explained by any of the Counsels for the accused. Thirdly, if at all Exhibit 54 was to be fabricated and concocted the police would have seen that it contains the names of all the accused and some more details, and, therefore, all these impossibilities, theory of false implication of any of the accused by the police under pressure of media, are to be rejected.

76. It will be clear therefore from the evidence of this witness that she has no grudge to hold against any of the accused. She has done her job as any sane, civilised person would do. She found

Glenda in a seriously injured condition. Glenda was unable to speak and therefore using her brain in a proper manner, she immediately tore the paper of her notebook and wrote down whatever Glenda was telling. This has been done in such a natural manner and in a spur of moment that it cannot create any doubt about the authenticity of Exhibit 54 or about its creation as stated by P.W. 12.

77. In this regard and regarding the evidence of Glenda that four boys from Rizvi Catering College had come, Mr. Memon tried to contend that none of the boys were students of Rizvi Catering College, but this submission is totally irrelevant. Whether they were from Rizvi Catering College or not is not a question. The question is what boys represented to Gelnda at the time of seeking admission. If they make a false representation and admittedly and obviously it is a false representation, it is to mislead Glenda and her mother and this misleading is clearly a part of their conspiracy because no conspirator would give particulars sufficient to establish his identification.

78. Mr. Memon also contended that no

investigation were done by the police to find out whether the phone numbers noted down by Glenda at Exhibit 73 as against the name of each of the accused were true and according to the record. According to us, nothing turns around this. In our opinion, the accused might have given correct phone numbers or false phone numbers and though it would have been better if police had made some enquiry in this regard also but not doing so, does not create doubt about the prosecution case.

79. These two witnesses P.W. 1 Adrin Lopes and P.W 12 Pamera Lopes and P.W. 18 Glenda Lobo are the only witnesses in this case who say something about the incident. (This is of course a general statement with reference to the evidence of other witnesses). Whatever their evidence is we have discussed so far as P.W. 1 and P.W. 12 are concerned.

80. Then, now what remains is most important witness P.W. 18 Glenda Lobo. Glenda’s evidence was seriously criticised and attacked by Mr. Memon on number of different grounds. Firstly, the attack was about the timing given by Glenda about the boys

visiting house of Leticia on 17.11.2003, she has stated that they came to the house at 8.30 a.m. and from the evidence of P.W. 17 Wayne Pereira it was tried to be contended that accused could not have reached the Leticia's house at 8.30 a.m. We have discussed this aspect and rejected the contention of Mr. Memon. We have also discussed the evidence of P.W. 18 Glenda about taking down notes in the notebook Exhibit 73 and then Exhibits 76, 77 and 78. Now what remains is the testimony of Glenda about the actual incident.

81. Similr submissions were made by Mr. Chomal, that if Glenda's evidence about the visit of the boys on 17.11.2003 is believed then evidence of P. W. 17 Wayne Pereria has to be discarded because of the difference of time. We are not at all impressed by this argument nor there is any substance. P. W. 17 Wayne Pereira is a young boy of 18 years of age, he was frightened by hearing the conspiracy and more frightened when he read the news of double murder on the next day i.e. on 20.11.2003. Therefore, there could be mistake of timing in his evidence. Further, two of the accused are related to him. He has no reasons to falsely

implicate any of them only because of the police pressure. His evidence was recorded in the court after two years of the incident, and, therefore, if he was a false witness or got up witness, he had ample opportunity to turn hostile and he would not have supported the prosecution. Apart from this, if the P,W. 17 Wayne Pereira was kept under pressure by the police for two years his so-called educated parents would have definitely resisted any such attempt and would have moved heaven and earth to free P.w. 17 Wayne Pereira from the said pressure or coercion.

82. We have discussed the evidence of P.W. 17 Wayne Pereira and we do not find any reasons to disbelieve him. He is a natural witness and not a got up witness or a witness introduced by the police to falsely implicate the accused under the pressure of media or under pressure of superior police officers as argued by Mr. Memon and Mr. Chomal.

83. In her deposition Glenda has stated that on 19.11.2003 she and her mother Leticia had their lunch at about 2 p.m. At that time door bell rang. Since mother had almost finished her lunch, the

mother answered it. Glenda also came out. She saw four boys who had come on 17.11.2003. Assis and Karan Khanna were sitting on the left side of the sofa and Clint and Clinton were sitting on the other sofa. Leticia asked Clinton Fernandes to go to Golden Stores and gave him Rs.100/- to buy chocolate slab. Accordingly, Clinton went and came back. Then at about 2.30 p.m. Leticia took all the four boys to the kitchen.

84. Glenda had stated that then her son has woken up, then she went to bedroom. Then at about 3.30 p.m. she heard loud screams of her mother Leticia and gave following details in her testimony.

> **" I opened the bedroom door and immediately rushed to see my mother. As soon as I came out of the bedroom the accused Ashish Warawale gagged me and with a knife that he was having with a handle he gave a blow on my head. That very moment I saw my mother struggling in a pool of blood. I saw Karan Khanna holding on to her hands tightly. Clinton Fernandes who had a knife in his hands was assualting my mother repeatedly on her face, chest and head. I was absolutely shocked. Soon therafter I saw the accused Clint Fernandes rushing towards me with a sharp edged knife. Ashish and Clint both dragged me to the hall. Clint Fernandes began sliting my throat and slashing the back of my neck and he assualted me on my forehead with the knife. I began to feel giddy. I fell on the floor. I fell near the sofa in the hall. Soon**

thereafter I saw Karan and Ashish rushing to the bedroom. I went unconsious thereafter. After sometime when I regained some consciousness I began calling out my mother I began to make movements to get up. Karan and Ashish heard my voice. They stormed out of the bedroom and rushed towards me. Karan picked up a cushion from the sofa and placed it over my face,to stop me from breathing. After a few attempts I turned my face to one side and pretended to be dead. I held my breathe and lay therein immobile. They dragged me and pushed me under the sofa. I fought desperately for consciousness, for I did not want those boys to go scot free.I continued seeing from the cavity of the sofa to ensure as to when those four boys would leave and I would hear the shutting of the door.As soon as I saw all the four leaving with great difficulty I struggled to come out of the sofa. I took the support of the furniture and the walls and I went straight to the bedroom to look for my baby boy. As soon as I entered the bedroom I saw my baby son hanging from the ceiling fan with a telephone wire. I looked around to see if I could make a telephone call,I found all the cupboards and the drawers in the bedroom open.I then came out of the bedroom to see my mother. I saw my mother lying in a pool of blood near the kitchen door in the passage that leads to the kitchen. She was not making any movement. I realised the motive that was behind what they did. I could also see that my wedding ring was, "gone". I did not waste any more time. I opened the door and struggled down the stairs and went to the first floor of the building in the flat just below mine.This was the flat of Adrien Lopes. Adrien and his family came rushing. They asked me as to what it was.I told them that four boys from Rizvi Catering College had come to my house to learn chocolate making and they robbed us. I told them that these boys were brought and introduced by Wilfried Dias and his mother Clara was a teacher in a Lady of Remedy School, Kandivali. I told Adries to attend my baby and then I also gave to him

my husband's phone number at Pune. After that I became unconscious."

85. The fact that Glenda was an eye witness cannot be challenged and had not been challenged by the accused either before the trial court or before this court and they could not have challenged it because admittedly in the same incident Glenda has suffered serious injuries for which she was hospitalised from 19.11.2003 to 27.11.2003. The entire cross-examination by either of the accused is devoted to other parts of her testimony and not about the actual incident which we have reproduced above.

86. According to Mr. Memon and Mr. Chomal, Glenda's evidence becomes suspicious because of number of omissions and contradictions in her statement. Those omissions are of the following type and nature.

. There is no mention in her police statement that Clint Fernandes rushed towards her with a sharp edged knife and Asis and Clint dragged her to the hall; there is no mention in her police statement that Clint Fernandes assaulted her on her forehead

with knife; there is no mention that after sometime when she regained some consciousness she began calling out her mother. According to her she told police that they stormed out of the bedroom and rushed towards her, but that is not there in the police statement. Then there is no mention in the police statement that "she continued seeing from the cavity of the sofa to ensure as to when those four boys would leave and I would hear the shutting of the door." Then she told the police that she went to the bedroom taking support of the furniture and walls to look for her baby, but that is not there in the police statement. Then she told the police that during her statement that four boys from Rizvi Catering College had come to her house to learn chocolate making and they robbed us,that is not there in the statement. Then she told the police that she had told P.W. 1 Adrin Lopes to attend to her son and also giving her husband’s phone number at Pune.

87. Mr. Memon and Mr. Chomal tried to contend that all these omissions are material and they affect credibility of the witness - P.W. 18 Glenda. We are not at all in agreement with Mr. Memon. She

was a woman having suffered serious injuries on her neck. She was in hospital when her statement was recorded on 19.11.2003 at or about 8.30 p.m. and, therefore, these minor omissions were bound to be there in her statement. If such omissions were not there, on the other hand they would have been unnatural particularly in this case. Therefore, these omissions are not at all material and occurrence of omissions is a natural consequence of her condition. Therefore, omissions do not affect the credibility of the witness, at all.

88. Second ground of attack of Mr. Memon and Mr. Chomal that why the notebook in which Exhibit 73 is there, was not handed over to the police on the very same day or why the police did not seize the same on that day. We have discussed this aspect earlier, but it would be necessary to mention that even though the police had come to know that some entries are made in the notebook, its non-seizure prior to 27.11.2003 does not affect the validity and importance of those entries, particularly, when as observed by us making such entries was a practice followed by Leticia and Glenda whenever she was present because there are three similar earlier

entries in the handwriting of Glenda i.e. Exhibits 76, 77 and 78.

89. Her evidence was also criticised by Mr. Memon and Mr. Chomal T.I. Parade coupled with the evidence of Vijay Ramchandra Pophale - S.E.O. P. W. No.15 who conducted parade. At this juncture, it is necessary to mention that T. I. parade has not been properly conducted. The panchas were selected at the police station, portion of the memorandum of parade was written in the police station but as rightly argued by Mr. Mhaispurkar, even if the entire evidence of T.I. Parade is discarded, that does not affect the case of the prosecution, because, as discussed above, Glenda had seen those boys for sufficient time on two occasions i.e. on 17.11.2003 and 19.11.2003, they had become known to her and, therefore holding of T.I. parade was not at all necessary. She had identified those accused in court, which is consistent with her case and evidence, therefore, defects and draw backs in the T.I. parade do not come to the rescue of the accused.

90. Since the prosecution had tried to seek

corroboration to the testimony of Glenda from her dying declaration recorded by the police on 19.11.2003 at about 8.30 p.m. it is necessary to consider the criticism of Mr. Memon with reference to that dying declaration. Mr. Memon had contended that Glenda had injuries to her throat and neck. There was profuse bleeding because of the attack and therefore after her statement was recorded at 8.30 p.m. on 19.11.2003 it was obligatory upon the police to obtain a certificate of fitness from the doctor. Mr. Memon contended that the so-called certificate obtained from the doctor is firstly not on the dying declaration recorded but it was on a separate piece of paper. it was not forming part of the charge-sheet when it was filed in court. There was no mention of such certificate in the charge sheet and it was tendered in evidence at a very late stage i.e. when the Glenda was examined. Further in the Statement of Glenda Exhibit 108, there is no statement that such a certificate of doctor was obtained nor any signature of the doctor on statement that separate certificate is given.

91. As against this, the learned APP contended that firstly obtaining certificate of fitness

separately and not getting an endorsement on the dying declaration itself is not objectionable nor the dying declaration can be rejected on that ground. Secondly, he contended that there is positive evidence on record to show that Glenda was conscious and well orientated at the time of giving her dying declaration. Mr. Mhaispurkar contended that in case of other dying declarations where the victims dies there is nobody to testify about giving the statement excepting the doctor and the person who recorded the statement. But here Glenda is alive and she has positively, specifically and clearly stated that her statement was so recorded on 19.11.2003 at 8.30 p.m. therefore, it cannot be doubted that Glenda's statement was not at all recorded. Further, according to him there is absolutely no contradiction or omission in the evidence of Glenda with reference to the said dying declaration.

92. In the medical casepapers - Exhibit 14 collectively which were tendered and proved by the doctor, at Exhibit 14 collectively, do show that Glenda was conscious and well oriented not only at 8.30 p.m. but earlier also.

93. It is true that regarding the doctor's certificate Exhibit 105, Dr. Mrs. Dipika Rane P.W. 22 had admitted that, in the case papers Exhibit 14 collectively, there is no mention that she had issued certificate like Exhibit 105. She also admitted that excepting her word there was nothing on record to show that certificate Exhibit 105 was issued at 7.30 p.m. and she also could not give any reasons why the certificate was not issued on the letter head of hospital. This witness P.W. 22, Dr. Mrs. Dipika Rana is however very specific that it was given on 19.11.2003 itself and not on any subsequent date as alleged by Mr. Memon.

94. Regarding the capacity of Glenda to give such a statement as Exhibit 108 on 19.11.2003 at or about 8 or 8.30 p.m. Dr. Girija Tulpule - P.W. 20 has stated that the injuries found on Glenda were grievous. She was asked about Exhibit 14 collectively and she has stated that page Nos. 4, 5, 11, 12, 14, 16, 17 and 18 were bearing her signatures and contents thereof were correct. The entire bunch was exhibited as Exhibit 14 collectively. Then, in the cross examination of

this witness P.W. 20 she has stated that from page No.2 of Exhibit 14 collectively it can be said that the patient was conscious and when the patient is well oriented the patient is conscious. She has also admitted that wound on the neck was not that deep as to injure the larynx on trachea. She has also stated that reason for her admission despite the injury being not grievous was that the neck injury had resulted in loss of blood owing to cutting of the muscles. She has also stated that the writing on page No.2 of Exhibit 14 collectively to the effect that patient was well oriented was in the handwriting of Dr. Mohit Zindal. She has admitted that she has given evidence on the basis of the record i.e. Exhibit 14 collectively.

95. It is clear from the evidence of witnesses P.W. 20 Dr. Girija Tulpule and P.W. 22 Mrs. Dipika Rana that even though Glenda had suffered injuries on her neck only her muscles were cut. The injuries were not grievous. She was admitted because of loss of blood and the injury to the neck had not affected the larynx on trachea. From this evidence, it is clear that Glenda was in a position to speak on 19.11.2003 i.e. when statement Exhibit

108 was recorded.

96. That in the first entry in Exhibit 14 collectively after admission on 19.11.2003, the condition of Glenda was written as "well oriented" Then on internal page 10 she was examined on 19.11.2003 at 8.30 p.m. and it is written "patient conscious oriented".

97. Apart from this, Exhibit 14 collectively, page 2 clearly show that she was well oriented and conscious not only at 8.3 p.m,. on 19.11.2003 but earlier also and therefore this positive evidence, firstly support Exhibit 105 - the fitness certificate given by doctor, but if even for the sake of argument, fitness certificate Exhibit 105 is not taken into consideration, the entries in Exhibit 14 collectively, proved by P.W. 20 - Dr. Girija Tulpule clearly show that when her statement was recorded on 19.11.2003 at 8.30 p.m. Glenda was conscious and well oriented. For these reasons, we, do not agree with Mr. Memon and reject his contentions that the Glenda was not at all conscious at the time when her statement was recorded or that her statement is a total fabrication by the police.

98. If the injures are not serious, nor grave, and she was admitted only because of loss of blood and her muscles were cut and larynx and trachea were in tact, then, they clearly show that her ability to speak was not affected. After admission she was given blood transposition as admitted by P.W. 20 that two bottles of blood were given and injected medicines and I.V. fluids were also given. Therefore, by the time police approached her in the night of 19.11.2003 Glenda was in a position to give her statement. Therefore, neither Exhibit 108 can be called as a fabricated document nor it can be called any interpolation by the police to strengthen the prosecution case. Exhibit 108 - statement of Glenda came to be recorded in usual course of manner to know from the actual injured as to what had happened on that day, she was fully conscious and well oriented and her evidence therefore is fully strengthened by the evidence of both the doctors P.W. 20 and P.W. 22. There are no reasons to discard statement of Glenda Exhibit 108, which now is corroborative piece of evidence for the prosecution as nothing was argued to the contrary in this regard.

99. Considering the aforesaid evidence, there is no reason to doubt that these accused had a conspiracy to rob Leticia Menedes. They introduced themselves on the pretext of learning chocolate making on 17.11.2003 and that on 19.11.2003 they entered the house of Leticia when Glenda was present and then attacked Leticia Menedes and murdered her, Master Dylon Lobo - 18 months child was killed and caused injuries on the neck of Glenda Lobo.

100. This story of the prosecution is supported by other corroborating evidence. Now, at this juncture, it is necessary to note the injuries received by Leticia Menedes because of the attack the injuries were received by Glenda and the cause of death of child Master Dylon Lobo.

101. So far as Leticia Mendes is concerned her post mortem report is at Exhibit 61. She had following injuries on her person :

1) Abrasion over Lt. had doorsem 2 cm. x 0.5 c.m.

2) I.W. over (Lt.) frontal area of scalp 3 c.m. x 1 cm. x scalp deep.

3) I.W. over (Lt.) Parital area of scalp 3 c.m. x 1 cm. x bone cut and two in nos.

4) I.W. over (Rt.) temporal area 5 cm. x 2 cm. x bone cut.

5) I.W. over (Rt.) parital area 7 cm x 2 cm. x bone cut.

6) I.W. over (Rt.) frontal area 2 cm. x 1 cm. x scalp deep.

7) I.W. over (Rt.) Post quricular area 6 cm x 4 cm x bone cut.

8) I.W. over frontal area 3 c.m. x 1 cm. x bone cut.

9) I.W. over upper lip 2 cm. x 1 cm. x 0.5 c.m.

10) I.W. over face (Lt.) side at angle B

mouth 7 cm. x 0.5 cm x 0.5 cm.

11) I.W. over chin 2.5 cm. x 0.5 cm. x Muscle deep.

12) I.W. over neck, transvarse in direction to size 7 cm. x 4 cm. x cutting neck muscles, blood vessals and trachea.

13) I.W. over chest (Lt.) side 2 cm. x 0.5 cm. x Muscle deep two in nos.

The cause of death of Leticia Mendes is given as "Heamorrage and shock due to multiple injuries."

102. So far as child - Master Dylon Lobo 18 months of age, is concerned, it was P.W. 14 Dr. Ramdas Sanap, who conducted the post mortem on the body of child. He found Legiture mark around the neck situated above thyroid cartilage encircling completely around the neck grooved and parchment like coloured obsize length 24 c.m. and breadth about 1 c.m. The cause of death was asphyxia due to strangulation (unnatural).

103. From the aforesaid evidence, it is clear that Leticia and Master Dylon Lobo the infant child died homicidal death.

104. So far as Glenda is concerned, she had injuries on her neck, cheek and forehead. The injures have been described in Exhibit 14 collectively. P.W. 22 who actually examined Dr. Mrs. Dipika Rana, gave the following injuries :

1) Incise wound on left side of neck middle third area horizontal 6 cm. x 1 cm.

2) Three incise wounds extending to the nape of the neck 4 cm. x 1 cm. subcutaneous deep. Three incise wounds on right side forehead 2 cm. x 5 c.m.

3) Incise wound on the right hand on the dorsum which was superficial.

4) Four small Incise wounds on right arm middle third area 5 cm.

105. Regarding this attack, Mr. Memon contended

that the story of the prosecution has become doubtful because no independent witness is examined by the prosecution. He stated that Glenda Lobo and Leticia Mendes were living in three storied building. All other flats were occupied and it is unnatural that not a single witness is examined by the prosecution about seeing the accused entering the building or accused leaving the building, after the attack particularly with their blood stained clothes if they had really inflicted so many injuries on Leticia and Glenda. He criticised the investigating agency either for not bringing those witnesses or for not making the investigation in that regard. Mr. Mhaispurkar, however contended that the time of the attack in the afternoon, mostly male members would be on their jobs and therefore there is nothing unnatural if there was nobody in the building who had seen the accused entering.

106. We do not find any force in the objection of Mr. Memon, in this regard. Since the deceased Leticia was running cookery and bakery classes, it was natural that boys, women, girls of different age or age group were going to attend those classes. Therefore, that was an activity continuously going

on and there was no necessity, need or occasion for any of the neighbours to specifically note coming in and going out of persons from the house of Leticia. Therefore, non examination of witnesses on this point by the Investigating Officer either during investigation or their non examination in court, does not affect the prosecution case at all.

107. The other evidence collected by the prosecution is of the following type of evidence. Finger Print expert P.W. 19 Hemchandra Ganpatrao Bane. Four chance prints were developed by him from the house of Leticia, two were on the bedroom, one on the refrigerator and one on the cupboard. In addition, two palm prints were also found that was exhibited as Exhibit 88. These chance prints according to this witness were of Assis Domnic accused No.1 and the other was of accused Karan Khanna, it is marked Exhibit 90. He has circulated opinion amongst other experts and they agreed with his conclusions. He produced all the originals. He also produced Exhibits 95, 96, 97 and 98, 99 in this regard. He was subjected to cross examination but nothing is brought on record to create any doubt about his opinion nor any serious submissions made

before us, in this regard, either by Mr. Memon or by Mr. Chomal. This opinion, therefore, lends support to the prosecution case about the presence of accused No.1, other accused Karan Khanna in the house of Leticia Mendes on 19.11.2003 in the afternoon.

108. So far as recovery is concerned, the prosecution examined P. W. 5 Rahubhai Harilal Oza, regarding the recovery from accused No.2 Clint Fernandes. The knife was recovered at the instance of the accused No.2 and this fact is deposed to and proved by this witness. The statement of accused No. 2 Clint Fernandes was recorded in the police station in the presence of this witness was marked Exhibit 24 and the discovery memo as Exhibit 28. This witness is an Estate Agent by profession having PAN number. He is therefore a respectable person. This recovery of knife is from a thicken or from bushes, the knife had blood stains. It was 12 inches long and he identified the knife and all his signatures on all the documents including the wrapper in which the knife was wrapped. Knife was shown to him, it was identified as Article 13. In this regard, Mr. Memon contended that firstly the

recovery was from an open space, therefore anybody could have knowledge about the weapon. This will create doubt about the recovery. We are not convinced by these arguments. P.W. 5 has given specifically how the accused No.2 led them to place in the police vehicle, they went first to M.H.B. Police station and took the route through Gorai and via Charkop and Hindustan Naka then right turn from Marvey Road, then from road going towards Mudh, from that road they took right turn, it was kuccha road towards Danapani Hotel, then at a particular spot, accused No.2 asked the vehicle to be stopped. There they got down and accused led them to the place where the knife was thrown or kept in the thicken or Zadi. From this it will be clear that the place was specifically and particularly known to the accused No.2 and its recovery from Zadi, does not affect the case of the prosecution at all.

109. Mr. Memon also contended that nowhere on these documents Exhibits 28 and 29 there are signatures of accused No.2. Mr. Memon also contended that P. W. 5 admitted that when accused gave his statement he was in hand cuffed. Therefore, Mr. Memon wants to contend that even if

any statement was given by the accused No.2, that should be disregarded if the accused was in handcuff.

110. In order to appreciate this, the exact evidence in cross-examination has to be seen. It is as below:

> **".. When I went to the detection room Mr. Mane officer, 6/7 other police persons and the accused No.2 were present. It is true that I had never seen the accused No.2 before 23rd November 2003. I was not even conversant with his name.... It is true that he was hand cuffed at that time."**

Now, there is nothing in the cross examination to show that when the accused gave his statement he was actually hand cuffed. Handcuffing the accused in a murder case is nothing unnatural. Accused cannot be permitted to escape from the jail or from the custody and therefore handcuffs are necessary. If the defence wanted to show that at the time of making statement handcuffs were there, then that should have been clearly brought on record. Therefore, in the absence of any such cross examination, the evidence of this witness cannot be discarded.

111. Next witness examined by the prosecution about recovery from accused No.1 - Assis is P.W. 10 - Santosh Subhash Bhardwaj - a sandwich vendor running his stall since 5-6 years before the deposition in the court. He has stated that on 19.11.2003 he had put his stall as usual. He was just about to close his business between 9.00 to 9.30 p.m. when accused No.1 Assis came to him and hurriedly placed the bag there and left the place. The witness stated that he kept the bag because after all accused No.1 used to visit his stall sometimes for taking sandwich. He identified accused No.1 as the same person and after two days police brought accused No.1 and this witness handed over the bag. When it was opened two mobiles and one charger were taken charge by the police. He identified the bag Article 24. He also stated that there was one blood stained knife in the bag. The police seized all these materials, viz. the bag, mobile phones, charger and the knife. He identified the knife as Article 25.

112. About this witness, Mr. Memon contended that if P.W 10 and accused No.1 Assis were not thickly known, there was no reason for this witness

to permit accused No.1 Assis to keep his bag in the stall. We do not find any force in this submission. Witness has clarified that Assis - Acucsed No.1 used to come to his stall for eating sandwich and this much acquaintance was sufficient for the witness to allow Assis - accused No.1 to keep the bag.

113. Secondly, Mr. Memon contended that the stall was not covered and opened and anybody could have put the bag. That does not appear to be the correct submission because in cross-examination this witness P.W. 10 has stated that his stall was in the form of cabin because he has stated **"I did not carry the bag home after closing the business for the day. It remained at the place it was kept at by the accused in the cabin."** He has also stated that he leaves behind things required for his business at the very same place after he closes it for the day.

114. So far as accused No. 3 is concerned, his recovery at his instance was proved by the prosecution, through P.W. 11 Sanjeet Chhaganlal Mujumdar. This witness has acted as a panch. In his presence, accused No.3 made disclosure statement which was written down and signed by the witness as

Exhibit 51. This statement was made by accused No.3 voluntarily. The panchnama is dated 2.12.2003. Thereafter, accused No.3 led the witness and the police party and other panch to the spot by vehicle they went through Charkop, Hindustan naka and Malad Marvey Road. From Jankalyan Road they went to a bank called Abhyuday Bank. The vehicle was halted there. Accused No.3 led the party to dilapidated structure and took down a plastic bag. It contained three gold rings. Those were identified by the witness as Article 9. He signed second part of Exhibit 51, which was exhibited as Exhibit 52.

115. Similar submissions were made by Mr. Chomal that these recoveries are from an open space but from the manner in which the police party was led by the accused No.3 to the place, it is clear that it was the accused alone who is knowing about this place. These three rings have been subsequently identified as belonging to deceased Leticia Mendes. The total weight of the three rings is given in the panchnama as 9 grams.

116. Since evidence of recovery of these gold rings - Article 9 is disbelieved by the court, it is

not necessary to go into that aspect of the matter, as no submissions were made by the Public Prosecutor.

117. For identifying the articles recovered from different accused, prosecution has examined P.W. 21 Xavier Jocquim Mendes - husband of deceased Leticia Mendes. He has stated that on 3.12.2003 police showed him jewellery and two mobile phones, he identified them as belonging to his wife and his daughter. Mobile phones were Article 12 collectively (Nokia and Siemens). Then Articles 2 to 11, 11-A and 11-B which were all ornaments were identified by him. Chain Article 5 belonging to Leticia, Bangle Article 6 belonging to Leticia. Articles 7 and 8 earrings belonging to her daughter Glenda, Article 10 pendent belonging to Leticia, Article 11A ring of her daughter of Glenda Article 11-B finger rings belonging to Leticia. He stated that Siemen mobile phone of her daughter Gelnda and Nokia mobile of his wife Leticia.

118. For identification of the jewellery ornaments, prosecution also examined P.W. 10 Gliffton Peter Zavier Mendes - son of deceased

Leticia. He has identified Article - 1 collectively imitation jewellery, gold bracelet - Article 2, gold chain - Article 3, gold bracelet - Article 4, , gold chain - Article 5, gold bangle - Article 6, gold earring - Article 7, six finger rings of gold - Article 9 Collectively, and six pendents of gold - Article 10 collectively, three gold rings - Article 11 Collectively, mobile phones Article 12 collectively, all jewellery and mobile phones were of deceased Leticia or Glenda.

119. Prosecution also examined P.W. 7 Nitin Jayantilal Vyas - a panch, about discovery of jewellery from accused No.2 Clint Fernandes. He has proved panchnama dated 20.11.2003 and also proved his signature and that of the other panch and signature of accused No.2. It is Exhibit 39. He has stated that accused volunteered to make a statement of keeping of jewellery or taking out of the jewellery from the place which he was going to point out. Thereafter, according to him police party and panchas and accused No.2 boarded the jeep and it was driven as per the directions of accused No.2, they went by Gorai Road and via Charkop to the side of Marvey. Then the vehicle was asked to be

stopped by accused No.2 and then accused No.2 led them to a hut and took out a packet of paper, it contained one bangle called Kada of gold, 5 - 6 rings of gold and 3 other rings entangled with one another, six small pendents of gold, one ring called "Panchgraha", and other ornaments. All of them were seized and second part of the panchnama was prepared and marked Exhibit 40, which he had signed along with other panchas. He identified Articles 2 to 11, Article 6, Article 7, Article 10 and Article 11. He did not identify other jewellery. About this recovery also Mr. Memon contended that a hut was accessible to all accused, it does not appear to have been locked. He also contended that no enquiry was made about the inhabitants of the house and there are no special identification marks. All these brought out in the cross examination, does not create any doubt about the discovery at the instance of the accused No.2.

120. About the clothes of accused No.2, prosecution examined P. W. 8 Ranjit Narayan Bendre He was called to police station on 20.11.2003. Accused No. 2 was there, he was wearing black T. shirt and a blue dark jean pant. There were blood

stains on his shoes and the clothes and shoes were taken charge by the police. He identified the panchnama and the sealed packet opened, which he had signed T- Shirt was given Article 21, pair of shoes was given Article 22 and the jean pant was given Article 23. On the bottom of the pant also there were stains like blood and it was torn on the left leg at the bottom.

121. In addition to the evidence of panchas about the recovery of weapons and ornaments they have also been corroborated by the evidence of the investigating officers.

122. Mr. Memon and Mr. Chomal, strongly criticised the evidence of Investigating Officers. They contended, firstly, that the investigating agency has been bias and against the accused because of the nature of the offence and because of the publicity and pressure of media. Their main criticism was not recovery of Exhibit 73 immediately after the police came to know about this incident from the statement of Glenda. We have already discussed that aspect and discovery of the said notebook or diary containing Exhibit 73 on

27.11.2003, is not at all doubtful circumstance.

123. Secondly, both the Counsels argued that no panchnama of seizure of Exhibit 54 was prepared and that creates doubt about its authenticity. It is true that there is no panchnama when the police seized Exhibit 54 from P. W. 12 Pamera Lopes - sister of P.W. 1 Adrin Lopes. It is true that there is no recovery or seizure panchnama of this document but from the nature of the document and from the evidence of Glenda P.W. 18, P.W. 1 Adrin Lopes and P.W. 12 Pamera Lopes, it cannot all be said that this document Exhibit 54 is creation of imagination of the police or it is a manipulated document. The document is genuine in the natural course having been brought into existence, and, therefore, lapse on the part of the police in not preparing the discovery memo, does not create any doubt about the same.

124. About medical certificate Exhibit 105 regarding the fitness of Glenda, much criticism was made by Mr. Memon, and he has contended that this document is a fabricated one because it was not forming part of the charge sheet not it was supplied

to the prosecution. We have also considered this aspect of the argument and rejected it on the ground that even if Exhibit 105 is disbelieved, Exhibit 14 collectively do prove that Glenda was concsious and well oriented when her statement was recorded in the night on 19.11.2003.

125. We also do not find any force in the submissions of Mr. Memon and Mr. Chomal that police under the pressure of media or of superior police officers have falsely implicated these accused. Firstly, no motive of whatsoever kind has been attributed to any of the prosecution witnesses for falsely implicating the accused. Neither there is any motive for P. W. 1 Adrin Lopes, P. W. 18 Glenda Lobo and P. W. 12 Pamera Lopes or any of the investigating officers or any of the panchas to falsely implicate the accused nor they have any reasons to take side of the prosecution. Investigation to the contrary is prompt to the point and sufficient to unfold the crime and prove it before the court below and before this court also.

126. Regarding identification parade also, we have discussed cross examination by Mr. Memon. We

have discussed and held that Glenda had sufficient opportunity to see and remember the accused on 17.11.2003 and 19.11.2003, and therefore any defect in the identification parade does not affect her testimony at all.

127. It is to be noted here that police had also taken the photographs of deceased Leticia and infant child Master Dylon Lobo while they were lying dead and hanged with the cord of the telephone wire. Regarding the recovery of three knives at the instance of the accused, Mr. Memon contended that there is no evidence of the prosecution to the effect that the accused had carried these weapons with them, no witness has seen them carrying the weapon nor Glenda said that the accused came for committing robbery well armed. There is no substance in this argument. Whether accused brought the weapons or not is irrelevant when the conspiracy to rob is proved and robbery has taken place followed by two murders.

128. It was also argued regarding the robbery that if at all there was a conspiracy the accused would not have met Glenda or Leticia on 17.11.2003,

would not have given their names and phone numbers and directly could have committed robbery on 19.11.2003 itself. This argument is also without any substance. We are to consider the positive evidence on record. What might have been done is of no consequence when concrete positive evidence is on record to the effect that accused entered into conspiracy and then in pursuance of that conspiracy they went to Leticia's house on 17.11.2003, introduced themselves, paid some fees, that their notings i.e. their phone numbers and names were noted, and then again on 19.11.2003 they went, it has to be said to the contrary that the accused secured their safe entry in the house of Leticia by introducing themselves on 17.11.2003.

129. The last piece of evidence is report of the chemical analyser. All the articles, the blood samples, blood stain clothes of Glenda, blood stain clothes of Leticia, clothes of child Master Dylon Lobo. The clothes recovery from the accused and the weapons were sent to the chemical analyser. The forwarding letter had been proved in that regard at Exhibit 111. Item G-1 two blue jean pants and G-2 pair of shoes with blood stains and item CH-11 knife

were found with human blood, grouping was inconclusive, then one more knife JH-1 was also found to contain blood stains.

130. To sum up, this is a case where prosecution has succeeded in proving beyond reasonable doubt that the accused entered into a conspiracy to rob Leticia, that they went to Leticia's house on 17.11.2003 and then on 19.11.2003, they robbed her of valuables, after murdering Leticia, after killing the child Master Dylon Lobo and after causing multiple injuries to P.W. 18 Glenda Lobo. The trial court has rightly come to the conclusion in this regard and, we, see no reason to give any different conclusion.

131. Therefore, so far as the appeal filed by Accused Nos. 1 and 2 is concerned, it has to be rejected. Similarly, appeal filed by the accused No.3 Wilfred Dias is concerned, it is also required to be rejected. Regarding Appeal filed by the State against acquittal of the accused No.3 from offences under Section 302 and other offences for which accused Nos. 1 and 2 are convicted is concerned, we do not find any reason to entertain the same appeal,

though we have condoned delay in those Appeals of the State. That appeal against acquittal is required to be rejected because admittedly accused No.3 Wilfred is not one of the persons who went to the house of Leticia on 19.11.2003. He may be a conspirator but he had not taken active role in the incident of 19.11.2003. Therefore, that Appeal against acquittal of accused No.3 as well as Appeal by the State for enhancement of the sentence of accused No.3 are rejected. In our opinion, sentence imposed upon Wilfred Dias by the trial court for five years under Sections 120B and 120B read with 392 of IPC and fine, is proper and adequate. Regarding this sentence of accused No.3, Mr. Chomal contended that the accused No.3 could have been given the benefit of Probation of Offenders Act. But Mr. Chomal had to admit that on the date of the judgment accused No.3 was 21 years of age. We do not find any substance that because of delay in delivering the judgment, the accused crossed the age of 21 or 22 years.

132. The theory of reformation advanced by Mr. Memon regarding Accused Nos. 1 and 2 is only to draw sympathy of the court. Record and proceedings

must show that accused had repentances about their diabolic act from the bottom of their heart and had showed willingness to reform them and this theory cannot be advanced during the stage of argument without creating trustworthy basis or ground by bringing circumstances in this regard on record.

133. Regarding death sentence awarded to accused Nos. 1 and 2 by the trial court, Mr. Memon made different submissions. Firstly, according to him, when from the evidence of Glenda Lobo, it was clear that fatal blows to Leticia were inflicted by two juvenile accused and the present accused had no role. Then imposing death sentence to them, was improper.

134. As against this, Mr. Mhaispurkar contended that Section 34 of IPC which was included in all the charges against the accused makes the accused liable because all the accused shared common intention of robbery followed by murder of Leticia and the murder of child Master Dylon Lobo in the same sequence of events or same transaction. Mr. Mhaispurkar relied upon a Judgment of the Supreme Court reported in **AIR 1955 S.C. 331 Rishideo Pande vs. State of Uttar**

Pradesh. He drew our attention to paragraph 4 of the said judgment, wherein the Supreme Court held that:

> **"Even where it is true that the appellant convicted under S. 302 read with S. 34, Penal Code did not inflict any blow on the deceased, yet if it is found that he shared the common intention to kill him and actually participated in the criminal act by being present on the spot armed with his lathi, then in the eye of the law, he is as much guilty of the whole criminal act as is his co-accused who actually dealt the fatal blow on the sleeping man."**

135. In that case appellant and his brother Ram Lochan were convicted under Section 302 read with 34 of IPC for murdering Sheomurat and each of them were sentenced to death. High Court confirmed the death sentence and the matter went to the Supreme Court. The main contention of the accused was that Section 34 was wrongly applied to the facts of the case. The Supreme Court relying upon Judgments of the Privy Council and its own judgments wherein the scope and effect of Section 34 was discussed, held that :

> **"It is now well settled that the common intention referred to in Section 34 presupposes a prior concert, a pre-arranged plan i.e. a prior meeting of minds..... It**

is not necessary to adduce direct evidence of the common intention. Indeed, in many cases it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties."

136. Therefore, if these tests are applied, as rightly pointed out by Mr. Mhaispurkar then accused Nos. 1 and 2 cannot now be permitted to contend that because the fatal attack on Leticia by the two juvenile accused, they should not be held responsible for the murder of Leticia. The evidence of the conspiracy adduced by the prosecution clearly show as to what was the common intention of the accused. It is followed by attack on Leticia and attack on Glenda and the murder of her infant child master Dylon Lobo. Even if from the Glenda's evidence it is seen that these accused Nos. 1 and 2 did not inflict any blow upon Glenda, the entire conspiracy was hatched by all the accused. It was materialised and two murders and serious injuries to Glenda were caused in the same transaction in pursuance to the conspiracy. Thereofre, these accused are required to be held guilty for the murder of Leticia, murder of Master Dylon Lobo and injuries to Glenda. The argument of Mr. Memon in this regard, is therefore, required to be rejected.

137. Secondly, he contended that if the acts of the juvenile accused are more serious vis-a-vis Leticia and because of their age they could not be tried along with the present accused and cannot be sentenced under The Juvenile Justice (Care and Protection of Children) Act, 2000 by the Juvenile Court, then, the court should seriously consider whether the present accused who unfortunately did not fall in the category of Juvenile, should be sentenced to death. Thirdly, he contended that there is no evidence on record at all to show that accused had gone with knives to commit the said robbery. According to him, it could be that in order to diffuse any resistance in spur of moment, they used knives in the kitchen of Leticia. Regarding the hanging of infant child by the accused, according to Mr. Memon perhaps that they did not want the child to cry and attract the attention of neighbours and therefore in a heat of passion, child came to be killed. However, according to Mr. Memon as laid down by the different judgments of the Supreme Court in this regard the balance sheet of mitigating and aggravating circumstances has to be drawn and if the

mitigating circumstances against which accused are considered, then they could not have been sentenced to death. Those mitigating circumstances so far as accused nos. 1 and 2 are concerned, they are as follows according to Mr. Memon.

1) That the accused Nos. 1 and 2 are tender age boys above 21 years;

2) That the accused had no criminal antecedents whatsoever. They have not even visited police station in the past;

3) That accused No.1 was taking education in Engineering and accused No.2 was doing graduation in commerce, and both come from respectable families.

4) There was no conspiracy to kill and the conspiracy was only, if at all the prosecution has accepted the theory to rob Leticia;

5) The theory of not armed while entering the house of Leticia on 19.11.2003;

138. Mr. Memon also contended in extension of his argument regarding the juvenile accused and these accused that if Juvenile court comes to the conclusion that the entire prosecution case is false against all the accused or atleast against the Juvenile boys or some witnesses turn hostile and did not support the prosecution, then in that case whether it would be proper to punish these accused with such a severe sentence.

139. As against this, Mr. Mhaispurkar contended the following:

1) That admittedly the murder of Leticia is done in a very cruel and gruesome manner in as many as 13 injuries were inflicted on her body.

2) There may not be evidence of conspiracy to kill but when 4 - 5 boys like the accused entering into conspiracy to rob Leticia, they knew that there would be resistance and they would not succeed unless the resistance of Leticia is fully

frustrated by use of force, therefore, accused knew when they entered into conspiracy that they would be required to launch physical assault on Leticia so that they succeed in committing the robbery;

3) There may not be evidence that accused were seen carrying weapons but that cannot rule out possibility that accused carried weapons with them because weapons produced before the court are such which could be hidden behind the clothes put on by the accused;

4) The tender age of the accused is not at all mitigating circumstances nor lack of antecedents and their coming from respectable families because the murder was in a very cruel, brutal and gruesome manner.

5) There was absolutely no reason to kill the infant child Dylon Lobo of one and half years of age. There was not any kind of resistance from that child and mere cries of the child would not have attracted any

attention of the neighbours but hanging the child to ceiling fan with telephone cord and killing him instantly was diabolic act.

6) This offence is an offence against the society because it is a robbery accompanied by double murders and serious assault on P.W. 18 Glenda Lobo and therefore when the offence is against the society, inadequate punishment, that is, converting death sentence to life would set a bad precedent and bad example before the society. The punishment has to be deterrent in such cases.

140. Mr. Memon relied upon the following judgments in support of his arguments:

1) 1977 Cri. L. J. 767 Shiv Mohan Singh vs. The State (Delhi Administration);

2) AIR 2003 Supreme Court 269 Subhash Ramkumar Bind @ Vakil and another vs. State of Maharashtra;

3) AIR 2003 Supreme Court 3131 Amit alias Ammu vs. State of Maharashtra;

4) AIR 2001 Supreme Court 2043 Raju vs. State of Haryana;

5) AIR 1974 Supreme Court 799 Ediga Anamma vs. State of A.P.

6) 1982 Supreme Court Cases (Cri) 361 Harbans Singh vs. State of Uttar Pradesh and Others.

141. On the other hand Mr. Mhaispurkar, relied upon the following judgments:

1) (2003) 1 Supreme Court Cases 648 Om Prakash alias Raja vs. State of Uttaranchal;

2) 2003 Cri. L. J. 3697 Dayanidhi Bisoi vs. State of Orissa;

3) (2003) 12 Supreme Court Cases 199

Praveen Kumar vs. State of Karnataka;

4) (2006)1 Supreme Court Cases (Cri) 499 Shailesh Jasvantbhai and Another vs. State of Guajrat and others.

142. The first judgment cited by Mr. Memon is in the case of Shiv Mohan Singh vs. The State (Delhi Administration) 1977 Cri. L. J. 767. In that matter High Court had confirmed the death sentence. The Supreme Court dismissed the Special Leave Petition, then the Review was filed, which came to be dismissed. Number of other attempts were made by the convict to avoid the death sentence and ultimately Revision came to be heard. The Supreme Court dismissed the Review Petition frustrating the attempt of the convict to avoid the death sentence. The ground before the Supreme Court in this Review Petition is right of the accused to be heard on the question of sentence in view of Sections 235(2) or 484 of Criminal Procedure Code.

143. Second Judgment relied upon by Mr. Memon is in the case of Subhash Ramkumar Bind @ Vakil and another vs. State of Maharashtra (AIR 2003 Supreme

Court 269), wherein it is stated by the Surpeme Court that:

> **"In every incidence of murder brutality is involved. Brutality obviously would be an existing factor but how the same did take place is the relevant and necessary material to be considered. Ours being a civilised society a tooth for a tooth and an eye for an eye ought not to be the criterion and as such the question of there being acting under any haste in regard to the capital punishment would not arise. Rather our jurisprudence speaks of the factum of the law Courts being slow in that direction and it is in that perspective a reasonable proportion has to be maintained between the heinousness of the crime and the punishment. While it is true punishment disproportionately severe ought not to be passed but that does not even clothe the law Courts, however, with an option to award the sentence which would be manifestly inadequate sentence having due regard to the nature of offence since an inadequate sentence having due regard to the nature of offence since an inadequate sentence would not subserve the cause of justice to the society."**

In that case the victim was unarmed and the accused persons murdered him by causing gunshot injuries. It appears that there were about 10 accused but accused Nos. 4 to 10 were absconding and the trial proceeded against accused Nos. 1, 2 and 3. In that case only one person died when number of shots were fired and the Supreme Court found that having regard to the nature of the offence and the

methodology adopted of punishment of death, was in excess of requirement of the situation and as such while recording concurrence with the findings of the High Court, the sentence was modified to life imprisonment.

144. The next judgment relied upon by Mr. Memon is in the case of Amit alias Ammu vs. State of Maharashtra (AIR 2003 Supreme Court 3131). It was a case of rape and murder of a 12 years old school girl. Death sentence was awarded to him which was confirmed by the High Court. In the Appeal, the Supreme Court held that thought the offence committed by appellant - accused deserves severe condemnation and is a most heinous crime. But on cumulative facts and circumstances, case does not falls in the category of rarest of the rate case and the Supreme Court held that the appellant will learn a lesson and have opportunity to ponder over what he did during the period he undergoes the life sentence. Therefore, having regard to the totality of the situation, the death sentence was modified and converted to imprisonment for life.

145. The next judgment relied upon by Mr. Memon

is in that case of Raju vs. State of Haryana (AIR 2001 Supreme Court 2043). Here also the case was of rape and murder of 11 years old child. There, the Supreme Court came to the conclusion that accused had given injury to the deceased by giving 2 bricks blow on head and mouth when she threatened that she would report the incident at house. Therefore, the Supreme Court concluded that the accused had no intention to commit murder and injuries were inflicted on spur of moment without there being any premeditation and therefore the death sentence was converted to life imprisonment.

146. The next judgment relied upon by Mr. Memon is in the case of Ediga Anamma vs. State of A.P. (AIR 1974 Supreme Court 799). The accused was a woman with a child of 10 years, she committed murder out of jealousy. The murder was of the woman and her tender child. While converting the death sentence to life imprisonment, the Supreme Court found that the present accused was a **"young woman of 24 flogged out of her husband’s house by the father-in-law, living with her parents with her only child, sex-starved and single. The ethos of the rural area where the episode occurred does not**

appear to have been too strict or inhibitive in matters of sex, for the deceased and the accused were both married and still philandered out of wedlock with P. W. 16, a middle aged widower who made no bones about playing the free-lance romancer simultaneously with them. Therefore, the accused incautiously slipped down into the sex net spread by P.W. 16 and while entangled and infatuated, discovered in the deceased a nascent rival with the reckless passion of a jealous mistress she planned to liquidate her." Therefore, in that background of the matter, the death sentence was converted or commuted to life imprisonment.

147. The last judgment relied upon by Mr. Memon is in the case of Harbans Singh vs. State of Uttar Pradesh and others (1982 Supreme Court Cases (Cri) 361), in support of his argument that in case the Juveline Court holds that Juvenile boys are not guilty or in case the prosecution fails to prove its case before the Juvenile Court or if the Juvenline Court comes to the conclusion that the entire case of the prosecution is false and concocted, then, according to Mr. Memon inflicting death upon these two accused i.e. Accused Nos. 1 and 3 may result

in inability to retrieve their lives if the death sentence is executed. In that case M, J, K and the petitioner H were convicted under section 302, IPC and their sentence of death was affirmed by the High Court M died in a police encounter. The separate appeals to the Supreme Court were filed. Special Leave Petition of J was dismissed on 15.4.1976 and he was hanged on 6.10.1981, but the Special Leave Petition of K was admitted and his appeal was allowed, wherein death sentence was commutted to life imprisonment. Special Leave Petition of H was dismissed and his review petition was also dismissed. In that background the Supreme Court observed that the unfortunate position appears to be that in respect of the very same offence committed, one of the accused persons, namely, Jeeta Singh has already been hanged, the death sentence imposed on another accused, namely, Kashmira Singh, has been commutted to one of life imprisonment; and Harbans Singh, the present petitioner, is now awaiting death sentence to be executed. In that background while exercising powers under Articles 32 and 136 of the Constitution and inherent power of jurisdiction for dealing with any extra ordinary situation in the larger interests of administration and for

preventing manifest injustice being done, the Court stayed the execution until the decision of the President to whom the copy of the judgment was forwarded.

148. So far as judgments cited and relied upon by Mr. Mhaispurkar, learned APP, are concerned, in the first case of Om Prakash alias Raja vs. State of Uttaranchal (2003) 1 Supreme Court Cases 648, a domestic servant killed three innocent members and attempted to kill 4th member of the family in order to take revenge for the decision to dispense with his service or to commit robbery, the accused's antecedents revealing his savage and cruel attitude, murders committed in most diabolical and brutal manner showing his scant regard for human lives, and, therefore the Supreme Court held that his conduct was repulsive to collective conscience of the society, he was beyond reformation and a menace to the society, mere young age of the accused cannot be a ground for desisting from imposing death sentence in absence of any other mitigating circumstances. The Supreme Court held that the correctness of conviction cannot be tested on the touchstone of lack of sufficient motive, if the

evidence establishes beyond reasonable doubt that the accused committed the crime.

149. The second judgment relied upon by Mr. Mhaispurkar, is in the case of Dayanidhi Bisoi vs. State of Orissa (2003 Cri. L. J. 3697), wherein the accused killed all the members of the family in greed of money, he was related to the deceased and used to visit the house of the deceased, the incident took place at night, blood stained clothes and the other incriminating evidence was collected against him, his finger print was also found at the place of incident, and, therefore, recording while confirming the death sentence, the Supreme Court observed that **" .....The fact that the murder in question is committed in such a deliberate and diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side, that too having enjoyed the hospitality and kindness of the victims, indicates the cold blooded and premeditated approach of the appellant to put to death the victims which include a child of three years age just to gain some monetary benefits."** This was therefore considered as rarest of the rare case and the death sentence was confirmed.

150. The next judgment relied upon by Mr. Mhaispurkar is in the case of Praveen Kumar vs. State of Karnataka, was also a case of robbery and murder, accused was a close relative of the victims, for meeting out his loan he committed the murder. The Supreme Court confirmed the death sentence holding that it was a cold-blooded murders of relatives and well wishers (including a young child) while they were sleeping, it is a preplanned murder for the sake of money, the appellant - accused showed no remorse for his conduct and therefore, the death sentence was confirmed.

151. The last judgment preplanned murder upon by Mr. Mhaispurkar is in the case of Shailesh Jasvantbhai and another vs. State of Gujarat and others [(2006) 2 Supreme Court Cases (Cri 499], wherein the Supreme Court held that the sentence should be proportionate to gravity of crime, corrective machinery or deterrent approach to be adopted depending upon the facts of the case and due consideration should be given to the facts and circumstances of the case, having regard to various factors including nature of offence and manner in

which it is executed or committed, motive for the crime, conduct of the accused, nature of weapons used and all other attendant circumstances. The Supreme Court also held that aggravating and mitigating circumstances should be delicately balanced and further observed rights not only of criminals but also of victims of crime and society at large should be kept in view. The Supreme Court in paragraphs 7, 8, 9 and 10 observed as follows:

> **"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that : "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society." Therefore, in operating the sentence system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for**

commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by his Court in Sevaka Perumal v. State of T.N.

9. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpablity that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determines largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

10. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all

> **serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction, drastic sentences are imposed. Anything less than penalty of greates severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it its out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.**

152. We have also noted the mitigating circumstances as pointed out by Mr. Memon and aggravating circumstances as pointed out by Mr. Mhaispurkar. It is true that out of them only one circumstance pointed out by Mr. Memon that needs consideration is the age of the accused. It is true that the accused Nos. 1 and 2 are young offenders but that in itself, in our opinion, is not at all a ground to impose lesser sentence of imprisonment of life upon them.

153. Admittedly, this is a case where five boys entered into a conspiracy to rob deceased Leticia. In order to win her confidence went to her house on 17.11.2003 and got admission to her cookery classes or bakery classes. one of the accused was known to

her and even then he used acquaintance to introduce others to facilitate the entire group to commit robbery, then in pursuance of their plan they went to her house on 19.11.2003 in the afternoon, Leticia gave Rs.100/- to one of the accused to bring chocolate slab from a particular store, that was brought by the accused, then they were with her for about one hour in the kitchen and thereafter they burst out with their plan. They attacked old lady Leticia inflicted in as many as 13 injuries with sharp edged weapons - three knives, when Glenda came they also attacked her and causing serious injuries on her person, and as held by the trial court for no rhyme or reason and even though there was no provocation or any chance of infant waking up neighbours due to his cries, they killed infant child of one and half years by hanging him to the ceiling fan with telephone cord. The infant was unable to understand anything, he was not likely to antognise any of these accused. his weeping or crying would have been regarded as natural and nobody would have suspected that his weeping or cries had anything to do with the brutal attack in the house of Leticia. Even then this child was put to death for no reason whatsoever.

154. Therefore, the entire act of the accused is reprehensible. Both the murders were brutal and diabolic, they were planned by entering into conspiracy and executed and then accused decamped with the booty i.e. jewellery worth about Rs.74,000/- or above which was found with accused along with weapons and shoes, finger print of one of the accused were found.

155. The age of the accused becomes irrelevant in the context of this case, because they had entered a conspiracy. It was not that the offence was committed by them at the spur of the moment. Two murders committed by them in sequence to achieve their objective i.e. to rob old lady of her valuables do reveal that the act of the accused is a menace to the society and so called argument about reformation is only to gain sympathy of the court and nothing more. Therefore, in the circumstances, viz. the accused belonging to the middle class respectable families and lack of any criminal record against them are not at all mitigating circumstances.

156. Mr. Memon tried to contend that it is not certain as to who out of the two accused hanged the child. This argument is totally futile because these accused i.e. accused Nos. 1 and 2 had entered the bedroom and the manner in which that diabolic act of hanging the child was executed, clearly shows that more than one person was required to participate in hanging the child to the ceiling fan with the help of telephone cord. Mr. Memon also tried to contend that even the evidence of P.W. 18 Glenda Lobo, shows that actual blows upon Leticia were inflicted by two juvenile boys and none of these accused had any role to play. We are not at all in agreement with this argument when all of them entered the house with common intention to rob and in sequence thereof Leticia was murdered and the child was killed, these accused i.e. accused Nos. 1 and 2 must be held to share the common intention in doing this entire act i.e. robbery and murders of Leticia and infant child Mast Dylon Lobo. Therefore, considering the mitigating and aggravating circumstances, we hold that there are absolutely no circumstances to justify imposition of sentence lesser than the death sentence.

157. We also noted the argument of Mr. Memon that two accused were not tried before the Sessions Court because they were juveniles and their trial is separated. His main thrust was that if the two accused i.e. if those two juvenile boys have dealt blows of deceased Leticia they are not going to be convicted or held guilty under the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000, then how and why these two accused i.e. Accused Nos. 1 and 2 should be awarded death sentence. He had initially requested for staying the hearing of the matter, which prayer we had rejected on the first day itself.

158. So far as this aspect is concerned, we are not at all in agreement with the submissions made by Mr. Memon that by virtue of the provisions of The Juvenile Justice (Care and Protection of Children) Act, 2000, cannot be tried together. So therefore, if at all those juvenile boys get protection i.e. by virtue of the provisions of a specific Act and not for any other reason. We had asked Mr. Memon repeatedly to point out any provisions in the law or any authority of any court to the effect that if Juvenile offenders cannot be held guilty, those

committing crimes along with juveniles should also be given benefit or given benefit of doubt. He however, could not site any precedent in this regard. Therefore, when these acts of these accused have been proved in regularly held full and complete trial and the trial court has found them guilty, then only because juvenile boys are to be tried by other court, no court can refrain itself from giving any finding about the guilt or otherwise of these accused. We, therefore, reject the contention of Mr. Memon and hold that merely on that ground no benefit can be given to these accused because evidence in every case will have to be scrutinised and appreciated and either accepted or rejected. The trial court judge has restricted himself to consider case only against the accused who were facing trial before him. We have also done the same thing. We have not given any finding about juvenile boys or about the role played by them, either way. Therefore, because the trial of the juvenile boys - accused, is not yet commenced or no offence / evidence is led therein, cannot be a ground to reject the entire positive evidence laid down by the prosecution in this case.

159. Therefore, ultimately this is a case where the reference of the Sessions Judge for confirmation of death has to be accepted. Before parting with the judgment, we must make a note of appreciation for Mr. R. B. Malik, Additional Sessions Judge, Greater Bombay, before whom the trial was conducted and who passed the impugned judgment. He has delivered a well reasoned judgment. His martialling of evidence, appreciation of facts and application of law, are highly commendable, his approach is sober and mature, and therefore, he deserves compliments. We, highly appreciate the manner in which he dealt with this case. These remarks should be entered in his service record and communicated to him, by the office.

160. Considering therefore all the arguments, judgements cited, the sentence of death awarded to both accused Nos. 1 and 2 has to be confirmed for the following reasons:-

1) The accused had conspired together to rob Leticia as they were knowing that she has cash and jewellery for which, she was to be robbed.

2) In pursuance of the conspiracy, they went to the house of deceased Leticia on 17.11.2003. To win her confidence they gave their names and phone numbers.

3) They showed their willingness to join her classes i.e. chocolate making classes, and this was a pretext to secure entry in her house.

4) On 19.11.2003 all of them went to deceased Leticia's house for chocolate learning, they obeyed her command and brought Chocolate slab from particular store. They were therefore inside the kitchen with no outsider or stranger inside. Thereafter, launched brutal attack on deceased Leticia by inflicting in as many as 13 injuries on her body by sharp edged weapons.

5) The injuries resulted in instant death of Leticia.

6) Thereafter, they attacked P.W. 18

Glenda Lobo inflicting injuries on her neck with a view to kill her so that no witness remains alive to testify against them. Glenda pretended to be dead.

7) Then, they entered the bedroom and killed one and half year child Master Dylon Lobo by hanging him to a ceiling fan with the help of telephone cord.

8) Therefore, Leticia was killed with a view to rob her, Glenda was attempted to be murdered by causing her serious injuries on neck etc. so that she does not remain alive to testify against them. Glenda survived as she pretended to be dead. There was no reason or rhyme for killing the innocent child of one and half year old, who would not have attracted the attention of anybody and his cries would not have been considered unnatural by any of the neighbours because infant usually weep or cry for no reason.

9) Thereafter, the accused came out with a booty of about Rs.74,000/-, most of

which was found with them, during investigation.

10) Therefore, this is a case where the accused have indulged into extreme brutality. Murder of Leticia was gruesome, brutal and murder of infant child master Dylon Lobo, was diabolic and cruel.

11) There are absolutely no mitigating circumstances in favour of the accused. They being educated boys or belonging to middle class respectable families or lack of criminal antecedents, are not at all mitigating circumstances, considering the fact that they had conspired to rob Leticia and they did not remain contented by merely robbing Leticia but they killed her brutally assaulting her and then killing the infant child Master Dylon Lobo.

12) There is no remorse or repentance on the part of the accused at any time, their age also does not give them any right of claimancy or sympathy from the court,

looking to the heinous nature of the crime.

161. Considering, therefore all these circumstances, no other inference can be drawn except that this is a rarest of rare case. The trial court was fully justified in awarding maximum sentence of death, and, therefore, we pass the following order :

ORDER

. Confirmation Case No. 5 of 2005 i.e. Reference made by Additional Sessions Greater Mumbai vide Confirmation Case No. 5 of 2005, is accepted. Sentence of death awarded to accused No. 1 Assis Domnic Warawale and accused No. 2 Clint Ernish Fernandes, is confirmed. They be hanged to neck till death.

. Criminal Appeal No. 48 of 2006 filed by Accused Nos. 1 and 2 Assis Domnic Warawale and Clint Ernish Fernandes, is dismissed.

. Appeal No. 184 of 2006 filed by accused No.3 Wilfred Francis Dias is dismissed.

. Appeals filed by the State for enhancement of sentence of accused No.3 Wilfred Francis Dias, and for his acquittal under Section 120B read with 302 of IPC, are dismissed. Office to number the Appeal filed by the State for acquittal.

. Operation of the sentence is stayed for a period of eight weeks from today, so as to enable the accused to approach the Supreme Court, if they so desire.

. Our appreciation of the trial court Judge Shri R. B. Malik in paragraph 159 of the Judgment should be communicated to him, by the office.

(D.G. DESHPANDE, J.)

(S.A. BOBDE, J.)